Supreme Court, U.S.
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No. 93-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LASZLO N. TAUBER, M.D.,
Petitioner,

v.

SALOMON FOREX, INC., SALOMON INC.,
SALOMON BROTHERS, INC., and FRED GATLING,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Treasury Amendment to the Commodity Exchange Act, 7 U.S.C. § 2(ii), permits a firm in the business of dealing in futures and options to avoid regulation under the Act by choosing to conduct such dealing outside a regulated exchange.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT	2
A. Statutory Framework	3
B. This Dispute	6
C. The District Court Decision	8
D. The Court of Appeals Decision	9
REASONS FOR GRANTING THE PETITION	12
A. THE ISSUE WARRANTS THIS COURT'S REVIEW	14
1. Circuit Conflict	14
2. Government Views	17
3. Practical Consequences	20
B. THE FOURTH CIRCUIT'S RULING IS INCORRECT	22
1. Statutory Language	22
2. Legislative History and Policy	26
CONCLUSION	29

TABLE OF AUTHORITIES

Cases

Page

Board of Trade v. SEC, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982) ..... *passim*
CFTC v. American Bd. of Trade, Inc., 803 F.2d 1242 (2d Cir. 1986) 11, 15
CFTC v. American Bd. of Trade, Inc., 473 F. Supp. 1177 (S.D.N.Y. 1979), *aff'd*, 803 F.2d 1242 (2d Cir. 1986) 15, 16
CFTC v. American Metal Exch. Corp., 693 F. Supp. 168 (D.N.J. 1988), *aff'd in part and vacated in part*, 991 F.2d 71 (3d Cir. 1993) 17
CFTC v. Co Petro Mktg. Group, Inc., 680 F.2d 573 (9th Cir. 1982) 5, 17
CFTC v. Standard Forex, Inc., No. CV-93-0088 (E.D.N.Y. Aug. 9, 1993), *appeal pending*, No. 93-6255 (2d Cir.) 16
CFTC and State of Georgia v. Sterling Capital Co., Comm. Fut. L. Rep. (CCH) ¶ 21,169 (N.D. Ga.), *modified in other respects*, Comm. Fut. L. Rep. (CCH) ¶ 21,170 (N.D. Ga. 1981) 16
Chicago Mercantile Exch. v. SEC, 883 F.2d 537 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990) 13, 15, 23, 24
John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517 (1993) 13, 29
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) 2, 3, 5, 24

Statutory & Congressional Materials

Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*

§ 1a(1) 8, 11, 22
§ 1a(3) 3
§ 1a(11) 5, 25
§ 2(i) 3, 23
§ 2(ii) ..... *passim*
§ 2a 3, 15, 23
§ 3 23
§ 5 ..... 10, 26
§ 6 ..... 4, 23

TABLE OF AUTHORITIES—Continued

	Page
§ 6(a)	3
§ 6(c)	4, 29
§ 6c(b)	4
§ 6c(d)	5
§ 6c(f)	4, 15, 24, 29
§ 6i	5
§ 7	4, 5
§ 7a	4
§ 9	5
§ 13	5, 26
§ 16	26
§ 25(a)(1)(C)(i)	8
15 U.S.C. § 78*o*-5	23
Commodity Futures Trading Commission Act, Hearings on S. 2485 et al. Before the Senate Comm. on Agriculture and Forestry, 93d Cong., 2d Sess. (1974)	28
Futures Trading Practices Act of 1991, Hearings on S. 207 Before the Senate Comm. on Agriculture, Nutrition, and Forestry, 102d Cong., 1st Sess. (1991)	16, 21
H.R. Conf. Rep. 978, 102d Cong., 2d Sess. (1992)	23
H.R. Conf. Rep. 1383, 93d Cong., 2d Sess. (1974)	27
H.R. Rep. 975, 93d Cong., 2d Sess. (1974)	6, 24, 28
S. Rep. 22, 102d Cong., 2d Sess. (1992)	7, 23
S. Rep. 426, 99th Cong., 2d Sess. (1986)	23
S. Rep. 850, 95th Cong., 2d Sess. (1978)	19
S. Rep. 1131, 93d Cong., 2d Sess. (1974)	6, 19, 27, 28
120 Cong. Rec. 34736, 34997 (1974)	28
Regulatory Materials	
17 C.F.R. § 32.11	4
17 C.F.R. § 32.4(a)	5
Statutory Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39,188 (1990)	5
Exemption for Certain Contracts Involving Energy Products, 58 Fed. Reg. 21,286 (1993)	21
Trading in Foreign Currencies for Future Delivery, 50 Fed. Reg. 42,983 (1985)	18

TABLE OF AUTHORITIES—Continued

Page

CFTC Interpretive Letter No. 77-12 [1977-1980 Decisions] Comm. Fut. L. Rep. (CCH) ¶ 20,467 (Aug. 17, 1977) 17

In re Stovall, Comm. Fut. L. Rep. (CCH) ¶ 20,941 (Dec. 6, 1979) 17, 28

SEC-CFTC Jurisdictional Correspondence, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,117 (Dec. 3, 1975) 5, 9, 18, 23

Other Materials

CFTC, *Annual Report 1992* 20

CFTC, *OTC Derivative Markets and Their Regulation* (Oct. 1993) ..... *passim*

1 P. Johnson & T. Hazen, *Commodities Regulation* (2d ed. 1989 & Supp. 1992) 5, 7, 20, 21

Laing, "The Next Meltdown? Fears Grow That Derivatives Pose a Big Threat," *Barron's*, June 7, 1993 22

Stein, *The Exchange-Trading Requirement of the Commodity Exchange Act*, 41 Vand. L. Rev. 473 (1988) 4

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Laszlo Tauber seeks review of the judgment of the United States Court of Appeals for the Fourth Circuit in this case. The court of appeals held that the "Treasury Amendment" to the Commodity Exchange Act (CEA), 7 U.S.C. § 2(ii), excludes from the comprehensive CEA regulatory scheme, and hence from the jurisdiction of the Commodity Futures Trading Commission (CFTC), a broad class of trading in options and futures involving foreign currency, government securities (such as Treasury bonds), and various other instruments, at the discretion of the trading parties. Petitioner challenges that interpretation of the CEA, which conflicts with other circuits' decisions and improperly permits a staggering volume of options and futures trading to avoid compliance with the CEA.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 8 F.3d 966. The opinion of the district court (Pet. App. 27a-44a) is reported at 795 F. Supp. 768.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1993. Pet. App. 2a. A timely petition for rehearing was denied on November 17, 1993. Pet. App. 55a-56a.

STATUTE INVOLVED

The Treasury Amendment to the CEA, 7 U.S.C. § 2(ii) [Section 2(a)(1)(A)(ii) of the CEA], states:

> Nothing in [the CEA] shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

This and certain other pertinent portions of the Commodity Exchange Act are reprinted at Pet. App. 57a-72a.

STATEMENT

This case involves trading in options and futures contracts. Although the contracts have an underlying commodity as their subject matter (here, foreign currency), entry into neither type of contract itself effects or is intended to effect a transfer of the commodity. Indeed, an option confers on one party only a right to make a future sale (never to be exercised if prices change adversely), and even futures, which on their face impose mutual obligations to make a future sale, are legally characterized by the parties' lack of intent actually to do so. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 358 (1982) (futures trading is done "with

no intent to take delivery"). Rather, trading parties buy and sell the contracts themselves, entering into "offsetting" transactions to net out gains or losses in cash. Nevertheless, the courts below, in their principal ruling, held that the purchase and sale of both options and futures constitute "transactions *in*" the underlying commodity under the Treasury Amendment (7 U.S.C. § 2(ii)) and, therefore, are wholly excluded from federal regulation under the CEA if the trading parties choose to exempt themselves from the regulatory regime.

A. Statutory Framework

The Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, is the comprehensive federal scheme regulating transactions relating to "commodities." Though originally limited to a list of named agricultural products, the statute was vastly expanded in scope in 1974, when Congress created the CFTC and extended the definition of "commodity" to include "all other goods and articles, . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. § 1a(3). The statute declares that the CFTC "shall have exclusive jurisdiction" over options and futures transactions, "except to the extent otherwise provided in section 2a of this title." 7 U.S.C. § 2(i).[1] The Act then imposes a host of regulatory restrictions on various forms of commercial activity involving a commodity (as long as it is the subject of trading in "contracts for future delivery," *i.e.*, "futures"), including rules relating to transactions in futures, options, and the commodity itself.

As to futures (contracts imposing mutual obligations to conduct a sale in the future), the fundamental requirement is that trading in the contract must take place on a formally organized exchange designated by the CFTC. 7 U.S.C. § 6(a). *See Merrill Lynch,* 456 U.S. at 359 ("futures trading must be regulated by an organized ex-

[1] The provision referred to in the except clause relates to certain securities-related transactions reserved to regulation by the SEC (7 U.S.C. § 2a). That provision is not at issue here.

change"). Any CFTC-approved exchange must, in turn, meet a host of detailed requirements. *See, e.g.*, 7 U.S.C. §§ 7, 7a. The specific rules that govern exchanges, together with the basic command that all futures trading take place on an approved exchange, are designed not only to protect traders (*e.g.*, against fraud, price manipulation, and insufficient collateral) but also to preserve properly functioning markets in the futures as well as in the underlying commodities (*e.g.*, by ensuring liquidity and open dissemination of trading prices). *See* Stein, *The Exchange-Trading Requirement of the Commodity Exchange Act*, 41 Vand. L. Rev. 473, 482-85 (1988).[2]

The CEA also extensively regulates trading in options (contracts that give one party a right, but not an obligation, to engage in a future sale with the other party). Although the regulatory regime is separate and in some respects different from that governing futures (*compare* 7 U.S.C. § 6c (options) *with* 7 U.S.C. § 6 (futures)), the basic requirement of trading on an approved exchange is the same. Thus, the statute provides that trading in options is allowed only to the extent permitted by the CFTC. 7 U.S.C. § 6c(b). And, as relevant here, the CFTC has banned the offer and sale of commodity options when not conducted on a CFTC-designated exchange. 17 C.F.R. § 32.11.[3]

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[2] In 1992, Congress gave the CFTC new authority to craft exemptions from the basic exchange-trading requirement, and other requirements applicable to futures, for particular types of transactions. 7 U.S.C. § 6(c). That authority has not been exercised to exempt the particular transactions or types of transactions involved in this case.

[3] The CEA excludes from its coverage options on foreign currency when traded on a national securities exchange. 7 U.S.C. § 6c(f). That provision does not apply to the off-exchange trading at issue in this case—although its enactment in 1983, as explained below, is relevant to the legal analysis in the case. In addition, some off-exchange dealing in "trade options"—options transactions "solely for purposes related to" a business's use of the underlying

In addition to futures and options, the CEA contains various provisions applicable to "commercial *cash* or *spot* market transactions in commodities" (1 P. Johnson & T. Hazen, *Commodities Regulation* § 1, at 2 (2d ed. 1989))—that is, purchases and sales, with actual delivery, of the commodity itself. Although such transactions need not be conducted on a regulated exchange, the CEA imposes a number of prohibitions—*e.g.*, or cornering, price manipulation, and false market reporting—that directly apply to such cash-market transactions. 7 U.S.C. §§ 7, 9, 13. *See also* 7 U.S.C. § 6i (reporting requirement for cash transactions).[4] Those provisions apply not only to sales where delivery is immediate, but also to sales where delivery, though fully intended, is deferred. Such "cash forwards" are specifically distinguished from "futures" under the CEA, although they are both contracts providing on their face for "future delivery" in an ordinary sense: the CEA expressly *defines* "future delivery" (the term describing "futures") to exclude "any sale of any cash commodity for deferred shipment or delivery" (7 U.S.C. § 1a(11)), thus establishing as a defining characteristic of futures the absence of a contemplated transfer of the underlying commodity.[5] Cash for-

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commodity—is permitted. 17 C.F.R. § 32.4(a); *see also* 7 U.S.C. § 6c(d). As this case comes to the Court, that authorization is not applicable here. *See* note 6, *infra*.

[4] *See SEC-CFTC Jurisdictional Correspondence*, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,117, at 20,831-41 (Letter from CFTC's Office of General Counsel, on behalf of CFTC, to SEC, Dec. 3, 1975) (CFTC's first discussion of Treasury Amendment, pointing to provisions of the CEA applicable to cash transactions).

[5] *See Merrill Lynch v. Curran*, 456 U.S. at 358 (futures trading is done "with no intent to take delivery"); *CFTC v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 578, 581 (9th Cir. 1982); 1 P. Johnson & T. Hazen, *supra*, § 1.05, at 14-18; CFTC, *OTC Derivative Markets and Their Regulation* 145 (Oct. 1993) (*"1993 CFTC Report"*); *Statutory Interpretation Concerning Forward Transactions*, 55 Fed. Reg. 39,188, 39,191 (1990) ("delivery as the feature distinguishing"

wards are accordingly excluded from the CEA provisions governing futures but remain subject to the CEA provisions governing cash transactions.

Among the commodities covered by the CEA is foreign currency, because there has long been trading in foreign-currency futures, as the 1974 Congress itself recognized. *See* S. Rep. 1131, 93d Cong., 2d Sess. 19 (1974); H.R. Rep. 975, 93d Cong., 2d Sess. 41, 153-54 (1974). Under the foregoing provisions of the CEA, therefore, any trading of options and futures involving foreign currency outside a regulated exchange ("off-exchange" trading) is prohibited. The legal issue presented in this case is whether violations of those prohibitions are excused by the "Treasury Amendment" to the CEA, which in relevant part states: "Nothing in [the CEA] shall be deemed to govern or in any way be applicable to transactions in foreign currency, . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. § 2(ii).[6]

B. This Dispute

Respondents (collectively, Salomon) are in the business of dealing in foreign currency options and futures, as well as numerous other financial instruments (such as government securities). In early 1989, Salomon's foreign currency affiliate (Salomon Forex)—an entity whose trading has never been subjected to regulation by federal banking authorities or other federal agencies other than the CFTC—began extensive trading of foreign currency options and futures contracts with petitioner Tauber per-

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forwards from futures). *See 1993 CFTC Report* 144 ("a particular contract may not be deemed to be both a futures contract and a cash forward contract under the CEA").

[6] That is the issue presented because the case was resolved by both the court of appeals and the district court on the assumption that it involves neither "trade options" nor "cash forwards." *See* Pet. App. 32a n.8 (district court); Pet. App. 17a, 22a (court of appeals).

sonally.[7] In that trading, Salomon acted as a dealer, not broker: it took the opposite side of its transactions with Tauber.

This trading was not for the purpose of acquiring currency. With only four exceptions, none of the 1,260 futures or 1,442 options resulted in delivery; rather, exposure on one set of contracts was "offset" by entry into other contracts, resulting in net dollar profits or losses. *See* Pet. App. 4a, 7a, 30a-31a. All of the trading occurred off-exchange, without any of the financial protections for both parties required by the regulated exchanges, including the requirement of daily calculation and posting of appropriate collateral (based on complex formulas for evaluating outstanding exposures). *See* S. Rep. 22, 102d Cong., 2d Sess. 3-4 (1992) (discussing practice of daily "marking to market"); 1 P. Johnson & T. Hazen, *supra*, § 1.10, at 41-48.

In October 1989, Salomon informed Tauber that it had miscalculated the proper collateral by $25 million: whereas Salomon had told Tauber that he had a $15 million surplus, in fact Tauber was $10 million short. Pet. App. 24a. Trading nevertheless continued until March 1991. At that point, Tauber had 68 futures contracts outstanding, due to mature in July and August 1991. Upon maturity, "[j]ust over $25 million became due and payable" to Salomon under those contracts. Pet. App. 4a.

In September 1991, Salomon sued for damages for breach of the 68 futures contracts, invoking the diversity jurisdiction of the United States District Court for the Eastern District of Virginia. As relevant here, Tauber answered that the contracts were unenforceable because they had been entered into off-exchange, in violation of the CEA. In addition, Tauber filed a counterclaim for

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[7] The district court found that Tauber "was Salomon Forex's only non-institutional client during this period." Pet. App. 30a.

damages from the sale of options (also illegally conducted off-exchange), which are subject to a stringent remedy under the CEA: "[a]ny person . . . who violates [the CEA] . . . shall be liable for actual damages . . . caused by such violation to any other person . . . who purchased from or sold to such person . . . an option subject to section 6c of this title (other than an option purchased or sold on a contract market or other board of trade)." 7 U.S.C. § 25(a)(1)(C)(i). Accordingly, the legality under the CEA of both the off-exchange futures trading and the off-exchange options trading was squarely placed in issue.

C. The District Court Decision

The district court granted summary judgment in favor of Salomon, holding that the Treasury Amendment removed trading in both futures and options involving foreign currency (and government securities and the other instruments listed in the Amendment) from the coverage of the CEA. Pet. App. 27a-48a, 51a-54a. The court concluded that compliance with the CEA was entirely optional with traders, depending on whether they chose to trade on or off exchange: "if folks want to deal off exchange trading in currencies, the Commodities Exchange Act does not apply. It doesn't matter whether it's an individual or an institution or what the nature of the entity is." Pet. App. 54a.

At the outset of its analysis of the Treasury Amendment, the court concluded that the "unless" clause of the Amendment did not apply here because none of the trading in this case "was conducted on a board of trade," a conclusion evidently based on reading "board of trade," despite its statutory definition (7 U.S.C. § 1a(1)), to refer only to organized exchanges. Pet. App. 35a. As a textual matter, then, the court said, "the disputed contracts are exempt from the CEA if they constitute 'transactions in foreign currency.'" Pet. App. 36a. On that question, the court ruled that "the phrase 'transactions in

foreign currency' plainly and unambiguously means any transaction, without limitation as to the participants involved, in which foreign currency is the commodity or subject matter." Pet. App. 37a.[8] "All transactions in which foreign currency is the actual subject matter of an off-exchange contract for future delivery are exempt from the CEA." Pet. App. 42a-43a.

D. The Court of Appeals Decision

The court of appeals affirmed. Pet. App. 1a-26a. The court began with a discussion of the legislative history leading to the enactment of the Treasury Amendment as part of the 1974 expansion of the CEA. Pet. App. 4a-10a. The court then described the varying interpretations of the Amendment put forth in the numerous briefs, including separate *amicus* filings (taking different positions) by the CFTC and by the United States, as well as filings by two state regulatory authorities and by a host of industry participants. Pet. App. 11a-14a. The court noted that the CFTC's contemporaneous interpretation of the 1974 Treasury Amendment (*see SEC-CFTC Jurisdictional Correspondence*, *supra*) adopted the view we urge —that the Amendment applies only to cash-market transactions in the actual *commodity*, not to transactions in *contracts*, whose subject matter may be the commodity but which, like futures and options contracts, are not intended to produce a transfer of the underlying commodity. Pet. App. 12a. The court of appeals nevertheless rejected that interpretation.

The court first reasoned that the "transactions in" clause of the Amendment must cover futures because the "unless" clause removes futures from the Amendment's reach. Pet. App. 15a-16a. The court next stated that

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[8] With respect to options in particular, the court acknowledged, without rejecting, the argument that the purchase or sale of an option is not a "transaction[] *in* foreign currency," but it held that the Treasury Amendment applies "once the option is exercised and the foreign currency traded or exchanged." Pet. App. 41a.

the Amendment had to reach beyond cash transactions, including cash forwards, in order to avoid redundancy, because cash forwards were already excluded from the CEA. Pet. App. 16a. Then, while apparently agreeing that the phrase "transactions in foreign currency" might not include "transactions *in contracts* for foreign currency," the court rejected the distinction for purposes of the CEA, because cash forwards were concededly included among "transactions in foreign currency." Pet. App. 16a-17a. Finally, citing 7 U.S.C. § 5, the court asserted that "the language of the Treasury Amendment excluding 'transactions in' the subject goods is used elsewhere in the Act to mean all transactions *involving* the commodity." Pet. App. 17a. Based on those textual arguments, the court inferred that futures must be covered by the Treasury Amendment and added: "it is a short step to conclude that the Treasury Amendment applies to *all* transactions in which foreign currencies are the subject matter, including options." Pet. App. 17a. The Fourth Circuit broadly concluded, as the district court had done: "under the appropriate interpretation of the Treasury Amendment, all off-exchange transactions in foreign currency, including futures and options, are exempted from regulation by the CEA." Pet. App. 17a.[9]

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[9] Having read the "transactions in" clause of the Treasury Amendment broadly, the court nevertheless said that it chose "not to decide" whether Salomon was a "board of trade" brought back under the CEA through the "unless" clause of the Amendment. Pet. App. 11a n.5. In fact, however, the Fourth Circuit decided that issue. It repeatedly stated its holding that the "Treasury Amendment" as a whole covers Salomon's trading here (*see, e.g.*, Pet. App. 17a, 22a), and the court's opinion repeatedly equates "board of trade" with "organized exchange." *See* Pet. App. 15a-16a ("unless" clause addresses "futures transactions conducted *on an exchange*") (emphasis added); Pet. App. 20a ("[w]hat the statute commands . . . is the exemption of all trading off organized exchanges"). Indeed, that interpretation of "board of trade" underlies the court's very footnote purporting not to decide the "board of trade" issue (Pet. App. 11a & n.5), which indicates that Tauber, in pointing out that the trades here were conducted *off-exchange*, had conceded

The court of appeals further concluded that the legislative history supported its holding, relying on the fact that the Department of the Treasury proposed the Amendment and, in its letter to the appropriate Senate committee, expressly referred to "futures trading" as within the proposed Amendment. Pet. App. 18a. The court also speculated about the "likely . . . substantial market disruptions" that would result from reading the Amendment to cover only cash transactions (Pet. App. 19a), although it cited in support only two *amicus* briefs that carefully avoid any claim that existing off-exchange markets actually involve options or futures subject to the CEA's exchange-trading requirement, as opposed to "trade options" or "forwards." *See* U.S. Br. 1-10; Foreign Exch. Comm. Br. 1-13. In addition, the court rejected the notion that the Amendment was limited to interbank trading. Pet. App. 19a-20a.

The court of appeals went on to deny that its reading of the Amendment conflicted with the leading decisions (by the Second and Seventh Circuits) on the question. Pet. App. 21a-22a, discussing *CFTC v. American Bd. of Trade, Inc.*, 803 F.2d 1242 (2d Cir. 1986), and *Board of Trade v. SEC*, 677 F.2d 1137 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982). The court did not dispute that those decisions expressly read the "transactions in"

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that Salomon was not a "board of trade" under the express CEA definition—although the very point of the argument is that "board of trade" extends beyond organized exchanges and, by its plain terms, fits Salomon perfectly, 7 U.S.C. § 1a(1) ("any . . . association, whether incorporated or unincorporated, of persons who are engaged in the business of buying or selling any commodity or receiving the same for sale on consignment").

Although this issue was not affirmatively raised in the district court (and does not arise if "transactions in" is properly construed), the district court expressly concluded that Salomon was *not* a "board of trade" based on equating the term with "organized exchange" (Pet. App. 35a-36a), and that conclusion was expressly challenged in the court of appeals (Tauber Br. 17 n.10; Tauber Reply Br. 17 n.11).

language of the Treasury Amendment in a manner contrary to its reading; indeed, the court acknowledged as much with respect to the Second Circuit decision. Pet. App. 21a. Nevertheless, the Fourth Circuit reasoned that the decisions were distinguishable from this case on their facts, because "both cases concerned *on-exchange* trading on behalf of the general public, not individual, large-scale deals between professionals." *Ibid.*

Consistent with that basis for distinguishing the other circuits' decisions on their facts, the Fourth Circuit finally sought to confine the impact of its ruling by asserting a possible limitation on its holding—without explaining the basis for the suggested limitation in its analysis of the Treasury Amendment. Although the court had unequivocally declared, consistent with its statutory analysis, that "*all* off-exchange transactions in foreign currency, including futures and options, are exempted from regulation by the CEA" under the Treasury Amendment (Pet. App. 17a (emphasis added)), the court indicated that "[t]his case does not involve mass marketing to small investors, which would appear to require trading through an exchange, and our holding in no way implies that such marketing is exempt from the CEA." Pet. App. 22a. "We hold only that individually-negotiated foreign currency option and futures transactions between sophisticated, large-scale foreign currency traders fall within the Treasury Amendment's exclusion from CEA coverage." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals' interpretation of the Treasury Amendment should be reviewed, then reversed, by this Court. As the numerous *amicus* filings in the court of appeals indicate, the issue presented—the meaning of the Treasury Amendment, particularly whether it allows futures and options trading involving foreign currency, government securities, and other specified instruments to be freely moved off-exchange, outside the regulatory scheme

of the CEA, at the discretion of the trading parties—is of dramatic importance: it affects a very large share, perhaps more than half, of all the futures and options trading now conducted on exchanges. Moreover, the law on this important question is now in utter disarray, as the CFTC has recently recognized.[10] The Fourth Circuit's interpretation of the Treasury Amendment conflicts with the decisions of other circuits; and the federal government, through the CFTC and other interested agencies, has long been, and is at present, hopelessly inconsistent in its stated positions on the question. This Court should resolve the conflicts and clarify what is a fundamental legal issue—whether trading must continue on regulated exchanges—for a tremendous volume of economic activity.

Correction as well as clarification is needed in this case. In particular, the Treasury Amendment's key phrase, "transactions *in* foreign currency," naturally refers only to the sale of the actual currency—cash market transactions—rather than to transactions solely in *contracts*, such as futures and options, whose subject matter may be the commodity but which are not intended to result in any transfer of the underlying commodity. *See Chicago Mercantile Exch. v. SEC*, 883 F.2d 537, 542 (7th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990) (futures trading "occurs in 'the contract,' not in the commodity"). This construction is supported by other CEA provisions, as well as by the CEA's comprehensive design to regulate futures and options, specifically including those involving foreign currency; and it reads the Amendment as a narrow exception, affecting only the CEA provisions that relate to *cash* transactions, just as the CFTC said in its contemporaneous interpretation of the Amendment in

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[10] *1993 CFTC Report* 6 (CFTC stating that "will consider recommending" legislation, "[i]n view of the prevalence of litigation over the scope of the Treasury Amendment, and the courts' lack of unanimity to which the recent Court of Appeals opinion contributes"). To our knowledge, no legislation has yet been recommended by the CFTC, much less agreed to by other government agencies or considered by Congress.

1975. *Cf. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 524 (1993) (favoring "tight reading of exemptions from comprehensive schemes of this kind"). The Fourth Circuit's rejection of this interpretation, moreover, rests at every step on plain misunderstandings of CEA and on an overreading of one item in the legislative history. *See also* note 16, *infra* (meaning of "board of trade"). Consistent with the reading long established in the Second and Seventh Circuits, this Court should restore the Treasury Amendment to its proper place as a narrow exception to the CEA, not as a loophole through which most of the activity now regulated under the Act can slip.

A. THE ISSUE WARRANTS THIS COURT'S REVIEW

Even aside from its incorrectness, the Fourth Circuit's ruling warrants this Court's review because of its importance. The legal issue presented is one on which the circuit courts, and the federal government itself, are deeply divided. And the sheer practical impact of the ruling is staggering, reaching millions of futures and options contracts (involving billions of dollars) that, until now, were confined to regulated exchanges.

1. *Circuit Conflict.* The Fourth Circuit's ruling that the Treasury Amendment excludes transactions in options and futures involving foreign currency from the CEA, because they are "transactions in foreign currency," squarely conflicts with the law in the Seventh and Second Circuits. In *Board of Trade v. SEC*, *supra*, which involved government securities (like foreign currencies, listed in the Treasury Amendment), the Seventh Circuit held that sales of options are outside the "transactions in" language of the Treasury Amendment. 677 F.2d at 1154. The court reasoned that the Treasury Amendment, like other provisions of the CEA, "distinguishes 'transactions in' from 'transactions involving' " (*id.* at 1146 n.17) and explained that an "option transaction is a long step removed from a transaction *in* the commodity involved" (*id.* at 1154 (internal quotation marks omitted)). Be-

cause "transactions in" refers only to transactions in the actual commodity, the Seventh Circuit concluded, neither options nor futures are covered by the Amendment: "The futures or options contract is not a transaction in a commodity . . . ." *Id.* at 1154 n.33.[11]

The Second Circuit subsequently followed the Seventh Circuit's analysis in a case dealing with foreign currency. The Second Circuit likewise held that sales of options are not "transactions in" the commodity under the Treasury Amendment. *CFTC v. American Bd. of Trade, Inc.*, 803 F.2d at 1248. The court expressly concluded "that an option to buy or sell foreign currency is not a purchase or sale of the currency itself and hence is not a transaction 'in' that currency, but at most is one that relates to the currency." *Ibid.* (agreeing with *CFTC v. American Bd. of Trade, Inc.*, 473 F. Supp. 1177, 1182 (S.D.N.Y. 1979), and with *Board of Trade, supra*).[12]

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[11] The *Board of Trade* decision was vacated as moot when the underlying jurisdictional dispute between the CFTC and SEC was resolved by legislation in 1982. 7 U.S.C. §§ 2a(i), 6c(f). As the CFTC has explained, however, the decision "continues to be relied on by the Seventh Circuit as authoritative." *1993 CFTC Report* at 150 n.173; *see Chicago Mercantile Exch. v. SEC*, 883 F.2d at 544. The Second Circuit has likewise treated the *Board of Trade* decision as authoritative. *CFTC v. American Bd. of Trade, Inc.*, 803 F.2d at 1248. (Moreover, the 1982 statute that mooted the *Board of Trade* case plainly assumes the validity of the Seventh Circuit's interpretation of the Treasury Amendment. *See* pages 23-24, *infra*.)

[12] The Second Circuit also stated: "An option transaction giving the option holder the right to purchase a foreign currency by a specified date and at a specified price does not become a 'transaction[] in' that currency unless and until the option is exercised." 677 F.2d at 1248. The last phrase, in shorthand, necessarily means that if an option is exercised, producing an actual sale of the underlying commodity, that sale is a transaction "in" the commodity. That later sale, of course, if it occurs (it did not in this case), is a second transaction, distinct from the initial sale of the *option*. *See* CFTC C.A. Br. 19. As the Fourth Circuit recognized, it is the legality of the earlier transaction (the sale of the option) that is at issue in this case, and the answer to that question is unaffected by any later exercise of the option by a sale of the commodity.

This interpretation of the "transactions in" language in the Treasury Amendment was uniformly adopted by the federal courts prior to the district court decision in this case.[13] Indeed, it was characterized as "well-established" in a 1991 letter to Congress from a committee of the American Bar Association.[14] The construction of the Treasury Amendment adopted by the Fourth Circuit in this case is directly to the contrary.

This conflict cannot be sidestepped, as the Fourth Circuit attempted to do, by engrafting onto its ruling a limitation to trading by "sophisticated, large-scale" investors. Pet. App. 22a. Even aside from the intrinsic instability of so imprecise and uncertain a standard, the Fourth Circuit made no effort whatever to tie the asserted limit to the construction of the Treasury Amendment, and Salomon itself has argued that it is impossible to do so.[15] Rather, in its actual analysis of the statute, the Fourth Circuit explicitly and unequivocally concluded that "*all* off-exchange transactions in foreign currency, including

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[13] *See CFTC and State of Georgia v. Sterling Capital Co.*, Comm. Fut. L. Rep. (CCH) ¶ 21,169, at 24,783-84 (N.D. Ga.), *modified in other respects*, Comm. Fut. L. Rep. (CCH) ¶ 21,170 (N.D. Ga. 1981); *CFTC v. American Bd. of Trade, Inc.*, 473 F. Supp. 1177 (S.D.N.Y. 1979), *aff'd*, 803 F.2d 1242 (2d Cir. 1986). In mid-1993, another district court rejected the interpretation of the Treasury Amendment adopted by the district court in this case and held that the Treasury Amendment did not exclude at least some foreign currency futures trading from the CEA. *CFTC v. Standard Forex, Inc.*, No. CV-93-0088, slip op. 15-27 (E.D.N.Y. Aug. 9, 1993), *appeal pending*, No. 93-6255 (2d Cir.).

[14] *See Futures Trading Practices Act of 1991, Hearings on S. 207 Before the Senate Comm. on Agriculture, Nutrition, and Forestry*, 102d Cong., 1st Sess. 837-38 (1991) (letter from Committee on Futures Regulation of American Bar Association Section on Business Law) (discussing Seventh Circuit decision).

[15] Salomon C.A. Br. 23 ("as the district court definitively explained, the Treasury Amendment unambiguously exempts *all* off-exchange foreign currency transactions, without regard to the identity of the participants").

futures and options, *are exempted from regulation by the* CEA." Pet. App. 17a (emphasis added). By the same token, nothing whatever in the statutory interpretation adopted by the other circuits turns on whether the parties are "sophisticated" or wealthy. There is no basis for supposing that the Second or Seventh Circuits, having unmistakably held that the "transactions in" clause of the Treasury Amendment does not reach options and construed the phrase to refer only to transactions in the actual commodity itself, would repudiate that position in a case presenting facts having no bearing on their statutory analysis. Only wishful speculation could deny the present state of disagreement in the law applicable in different circuits.[16]

2. *Government Views.* The unsettled state of the law is only exacerbated by the wide divergence of views expressed by the federal government. Notably, the CFTC, the agency charged with administering the statute, has taken positions directly inconsistent with the Fourth Circuit's interpretation of the Treasury Amendment. With respect to *options,* the CFTC's only expressed view on the relevant issue squarely disagrees with the Fourth Circuit position. The CFTC told the Second Circuit in its brief in *American Bd. of Trade* (at 27-28) that it agreed with the Seventh Circuit's conclusion "that options to purchase a physical commodity are not transactions 'in' the commodity for purposes of the Treasury Amend-

[16] Similarly, to the extent that the court of appeals in this case necessarily held that a "board of trade" must be an organized exchange (*see* note 9, *supra*), its position conflicts with that of the Ninth Circuit. *CFTC v. Co Petro Mktg. Group, Inc.*, 680 F.2d at 581-82; *see also CFTC v. American Metal Exch. Corp.*, 693 F. Supp. 168, 176-79, 193 (D.N.J. 1988), *aff'd in part and vacated in part on other grounds*, 991 F.2d 71 (3d Cir. 1993). The Fourth Circuit's view is also in conflict with the longstanding view of the CFTC—which, in its brief in this case, deemed it essential to address this issue in order to resolve this case. CFTC Br. 12; *In re Stovall*, Comm. Fut. L. Rep. (CCH) ¶ 20,941, at 23,779-82 & n.28 (Dec. 6, 1979); *CFTC Interpretive Letter No. 77-12* [1977-1980 Decisions] Comm. Fut. L. Rep. (CCH) ¶ 20,467, at 21,911-12 (Aug. 17, 1977).

ment." In the present case, the CFTC nowhere repudiated that position on the Treasury Amendment's inapplicability to the sale of options.[17]

With respect to *futures*, the CFTC's initial interpretation of the Treasury Amendment, all but contemporaneous with its enactment, took precisely the position we urge, explaining that the Amendment "was intended to make clear that the CFTC would not have any jurisdiction with respect to the purchase and sale of the enumerated financial instruments themselves (the 'cash market'), but would have jurisdiction solely with respect to futures trading in those instruments." *SEC-CFTC Jurisdictional Correspondence, supra*, at 20,834. The CFTC explained that the Amendment was meant to ensure that the manipulation, reporting, and other provisions of the CEA applicable to *cash-market* transactions would not be applied to the transactions routinely conducted by banks in the listed financial instruments, which were already subject to federal banking authorities' regulations. *Ibid.* In 1985, the CFTC changed course, issuing a "statutory interpretation and request for comments," which indicated that, although the Treasury Amendment does *not* cover futures trading with the general public, it might cover futures and other transactions "among and between banks and other sophisticated, informed institutions." 50 Fed. Reg. 42,983, 42,984 (1985). In its brief in the present case, the CFTC reiterated that position, vigorously disagreeing with the district court's interpretation of the Amendment but then arguing that the Amendment is ambiguous, freeing the courts to adopt the CFTC's "sophisticated institutions" view as reflecting congressional intent. CFTC Br. 11-19.[18]

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[17] The CFTC brief in the Fourth Circuit avoided the question as to the legality of the sale of options, stating (at 19-20) that the district court here had focused only on "exercised" options contracts. As noted above, the Fourth Circuit correctly understood that the question could not thus be avoided.

[18] The CFTC took the same position in *Standard Forex* and in its 1993 Report to Congress (at 153-55), where it also noted that the

The Department of the Treasury has itself taken different positions. At the time the Amendment was being proposed, the Department referred to the proposal as covering "futures," but it nowhere mentioned options. *See* S. Rep. 1131, *supra*, at 49-51. In 1978, on the other hand, the Department described the market that the Treasury Amendment was designed to remove from CEA coverage as a *forwards* market, not a *futures* market. S. Rep. 850, 95th Cong., 2d Sess. 46 (1978).[19] In 1986, however, the Department wrote a letter to the CFTC (dated May 5, 1986), challenging the CFTC's 1985 "statutory interpretation" and arguing that the Amendment "places outside the coverage of the Act all off-exchange future transactions in the listed financial instruments," without regard to "the characteristics of participants in a transaction." And in this case, the "United States"—apparently presenting the views of the Department of the Treasury and, perhaps, those of the SEC as well[20]—filed a brief in the Fourth Circuit that expressly

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Fourth Circuit's "legislative analysis is inconsistent in some respects" with the analysis adopted at the CFTC's urging by the district court in *Standard Forex. 1993 CFTC Report* 155-56.

[19] The Department's 1978 letter to Congress recognized both the practical similarity and the legal distinctness of the on-exchange and off-exchange trading: whereas "the CFTC has jurisdiction over *futures* trading based on Government securities," the off-exchange market involves "contracts for *forward* delivery, some of which have elements in common with trading in *futures* contracts on organized exchanges." S. Rep. 850, *supra*, at 47, 46 (emphasis added); *see id.* at 47 (off-exchange "trading activity of a similar nature to futures contract trading on an exchange").

In 1986, the Comptroller of the Currency, in a letter to the CFTC (dated Apr. 11, 1986) commenting on the "statutory interpretation and request for comments," described the interbank market as involving "forward FX transactions" and said that "the 1975 Treasury amendment . . . exempted certain forward transactions in foreign exchange by banks."

[20] The SEC did not separately appear on or sign the brief "for the United States," but the interests of the SEC are discussed in

disagreed with the Second and Seventh Circuit's construction of the Treasury Amendment (U.S. Br. 21-22) and instead agreed with the district court's holding that the Amendment excludes all futures and options from the CEA, regardless of who the traders are (U.S. Br. 13-18). This cacophony of views from the government, which reflects longstanding jurisdictional battles as well as policy differences, is obviously persistent, contributing to the deeply unsettled state of the law on the question presented.

3. *Practical Consequences.* Without doubt, the decision in this case "will have far-reaching effects." Pet. App. 13a. The precise impact depends on exactly what types of instruments may qualify as "foreign currency," "government securities," or any of the other potential commodities listed in the Treasury Amendment. What is not disputable is that a very large percentage, perhaps well over half, of the hundreds of millions of futures and options contracts currently traded on the regulated exchanges would be excluded from regulation if, as the Fourth Circuit concluded, the Amendment covers futures and options.[21]

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the "interest of *amicus*" section. More recently, on October 28, 1993, SEC Commissioner Beese presented testimony on behalf of the SEC (to the House Committee on Banking, Finance and Urban Affairs) expressing the view that options and futures involving foreign currency generally remain subject to the CEA (and hence must be outside the reach of the Treasury Amendment): under the 1982 legislation enacted in response to the Seventh Circuit's *Board of Trade* decision, he said, "the CFTC retained exclusive jurisdiction over all futures contracts . . . and options on . . . foreign currency (except if traded on a securities exchange)." Testimony at 3 (footnotes omitted).

[21] "The nearly twenty-nine million foreign currency futures contracts traded in 1991 accounted for more than 12 percent of futures transactions in the United States. The seventy-eight million futures contracts on government securities accounted for about 30 percent of United States futures trading and more than 70 percent of the [Chicago Board of Trade's] annual volume." P. Johnson & T. Hazen, *supra*, at 136 n.3b (Supp. 1992). *See also* CFTC, *Annual*

Under the Fourth Circuit's ruling that "all off-exchange transactions in foreign currency, including futures and options, are exempted from regulation by the CEA" (Pet. App. 17a), all of that trading could be moved off-exchange, and removed from all of the regulatory protections under the CEA, at the discretion of the traders. The result would be essentially identical even under the Fourth Circuit's announced limitation of its ruling (for now) to "professionals," who make up virtually the entire market. Pet. App. 21a; *id.* at 22a ("sophisticated, large-scale foreign currency traders").[22] As a practical matter, then, the Fourth Circuit permits outright deregulation of a very great deal, perhaps most, of the trading currently subject to CEA regulation. *See* P. Johnson & T. Hazen, *supra*, § 4.36, at 136 (Supp. 1992) (under district court's "extremely controversial" interpretation, "the door has been opened for off-exchange trading in foreign currency futures, Treasury Bond futures, and other financial instruments identified in the Treasury Amendment"). That extraordinary consequence is sufficient by itself to justify review, especially in light of the

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Report 1992, at 93-104 (almost 300 million futures contracts and 70 million options contracts in 1992; figures for various regulated exchanges); *Futures Trading Practices Act, supra*, at 533 (government securities options trading on Chicago Board of Trade exceeds $11 billion daily).

[22] *See Exemption for Certain Contracts Involving Energy Products*, 58 Fed. Reg. 21,286, 21,296 (1993) (dissenting opinion of Comm'r Bair) ("approximately 98% of users of regulated, exchange-traded futures" meet "sophistication" standard): *Futures Trading Practices Act, supra*, at 533 ("Public retail customer participation in Chicago Board of Trade markets is negligible—approximately one to three percent of exchange volume.").

This is not a fanciful concern. The major futures exchanges have recently shown active interest in removing large amounts of their trading from much or all regulation: *e.g.*, the Chicago Board of Trade has petitioned the CFTC for a broad "professional trader" exemption from the CEA. 58 Fed. Reg. 43,414, 43,431 (1993).

concededly serious risks of unregulated futures and options trading.[23]

B. THE FOURTH CIRCUIT'S RULING IS INCORRECT

The court of appeals' decision should be reviewed not only because the question is important but also because the ruling is wrong. The best reading of the Treasury Amendment is the one that was established in the courts before the district court decided this case and that is consistent with the CEA's comprehensive coverage of futures and options trading: the Amendment narrowly excludes only transactions in the actual commodity from the CEA (specifically, from the manipulation and reporting requirements applicable to such transactions); it does not deregulate futures, options, or other transactions in which only *contracts* are traded (where the parties do not effect or have an interest in an actual transfer of the underlying commodity). For reasons briefly set out below, the Fourth Circuit's rejection of that construction rests on critical errors at every step in its statutory analysis.[24]

1. *Statutory Language.* The key words of the Treasury Amendment, "transactions in [a commodity]," are

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[23] *See* Laing, "The Next Meltdown? Fears Grow That Derivatives Pose a Big Threat," *Barron's*, June 7, 1993, at 15 (interview with Salomon's chairman, Warren Buffett) (Buffett "opined that derivatives might one day trigger a catastrophic 'chain reaction' in world financial markets. For one thing, he explained, the derivatives market lacks the restraints of exchange-traded futures and options —namely, the posting of margin by both buyers and sellers, daily marking to the market and margin adjustments of positions and the guaranteeing of the integrity of all trades by some centralized clearing house with broad assessment powers.").

[24] As to the Fourth Circuit's equating of "board of trade" with "organized exchange" (*see* note 9, *supra*), we note here only that it contradicts the explicit statutory definition of "board of trade," which by its terms covers a firm like Salomon that is in the business of buying and selling financial instruments that are commodities under the CEA. *See* 7 U.S.C. § 1a(1). This question needs to be reached as a separate issue only if this Court accepts the Fourth Circuit's interpretation of the "transactions in" language.

naturally read to refer to a transaction designed to effect an actual transfer of the commodity. With the purchase or sale of a mere option, or of a futures contract (where delivery is not intended), the trading "occurs in 'the contract', not in the commodity." *Chicago Mercantile Exch. v. SEC*, 883 F.2d at 542 (per Judge Easterbrook). A broader phrase, such as "in respect to" (7 U.S.C. § 3) or "in connection with" (7 U.S.C. § 6) or "involving" (7 U.S.C. § 2(i), (ii)), was readily available if Congress wished to reach more broadly. *See Board of Trade*, 677 F.2d at 1146. And when Congress elsewhere used the phrase, "transactions *in* government securities" (15 U.S.C. § 78*o*-5), it made clear (with an eye on the Treasury Amendment) that the phrase covered only actual sales of the government securities, *not* "trading in government securities futures" (S. Rep. 426, 99th Cong., 2d Sess. 23 (1986)).

This reading not only fits the statutory language, and accords with the CFTC's contemporaneous interpretation (*see SEC-CFTC Jurisdictional Correspondence, supra*) and consistent judicial precedent prior to this case, but is confirmed by at least two other directly relevant provisions of the CEA. First, if futures and options are covered by the Treasury Amendment (7 U.S.C. § 2(ii)), it is more than a little surprising that the CEA's grant of exclusive jurisdiction over futures and options in the very preceding provision (7 U.S.C. § 2(i)) makes no exception for the Amendment.[25] Instead, the exclusive-jurisdiction provision identifies another provision (7 U.S.C. § 2a) as the sole exception. Second, when Congress responded to the Seventh Circuit's *Board of Trade* decision, it did so, *not* by repudiating the *Board of Trade* interpretation

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[25] In 1992, Congress cleaned up the "extremely confusing . . . organization" of Section 2(a)(1)(A) of the CEA, with definitional provisions now separately codified in 7 U.S.C. § 1a. S. Rep. 22, *supra*, at 48. The textual point made above, however, fully applies to the pre-1992 provision. Congress intended "[n]o substantive changes in law" by its 1992 reorganization. *Ibid.*; *see* H.R. Conf. Rep. 978, 102d Cong., 2d Sess. 72 (1992).

of the Treasury Amendment, but instead by adding a new exclusion for "any transaction in an option on foreign currency traded on a national securities exchange" (7 U.S.C. § 6c(f)). That provision not only takes the *Board of Trade* reading of the Treasury Amendment as a given (*see Chicago Mercantile Exch. v. SEC*, 883 F.2d at 544 ("[t]he legislation . . . left in place the premise on which [*Board of Trade*] was founded")), but reaffirmed Congress's insistence that options trading take place on a regulated exchange.

The Fourth Circuit did not dispute the natural meaning of the words "transactions in"; indeed, it seemed to acknowledge at least the availability of this interpretation. Pet. App. 16a-17a. Rather, the court relied on four textual arguments to read the phrase more broadly. But each of the arguments—aside from applying only to futures, without any further reasoning to justify the jump to options—is patently flawed.

First, the court's statement that the "transactions in" clause of the Amendment must encompass futures because the "unless" clause does (Pet. App. 15a-16a) rests on a false premise. The "unless" clause refers to transactions that "involve" futures, not transactions "in" futures; and a cash sale of a commodity does involve a future when it is the result of performing a future—an unusual, unplanned, but regular occurrence. *See Merrill Lynch*, 456 U.S. at 359 n.9 ("about '3% of all futures contracts traded are normally settled by an actual delivery' ") (quoting H.R. Rep. 975, 93d Cong., 2d Sess. 149 (1974)). The "unless" clause thus refers to *cash* transactions, and so there is no basis for insisting that the "transactions in" clause must be read, contrary to its most natural meaning, to reach beyond cash transactions.[26]

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[26] The Seventh Circuit explained: "The purpose of the 'unless' clause . . . is not to except . . . options or futures from the Treasury amendment. Rather, the 'unless' clause is needed (and was enacted) to except the transactions in [the instruments listed in the Amend-

Second, the Fourth Circuit's statement that the Treasury Amendment would be redundant if it excluded only forwards and other cash transactions (Pet. App. 16a) rests on the false assumption that cash forwards are already completely excluded from the CEA. In fact, cash forwards are excluded only from the definition of "future delivery" (7 U.S.C. § 1a(11)), leaving them entirely subject to the various provisions of the CEA that regulate cash transactions—as the CFTC explained in 1975. *See* pages 5, 18, *supra*. The Treasury Amendment, by contrast, lifts those cash-transaction requirements, because it is an exemption from the CEA as a whole ("Nothing in this Act . . ."). The Fourth Circuit's redundancy reasoning simply misreads the CEA.

Third, the court's doubt that the "transactions in" phrase could encompass cash forwards without also encompassing futures contracts (Pet. App. 16a-17a) misunderstands the distinguishing characteristic of cash forwards. An actual delivery of the underlying commodity is planned with a forwards contract, and so entry into such a contract is not a mere "transaction in *contracts*" (Pet. App. 17a), but a bona fide commodity sale, with delivery merely deferred. In contrast, entry into a futures contract *is* only a transaction in a contract, for its defining characteristic is that no transfer of an underlying commodity is contemplated. *See* note 5, *supra*.

Finally, the court of appeals' remaining textual argument—that 7 U.S.C. § 5 uses "transactions in" to refer to "all transactions *involving* the commodity" (Pet. App. 17a)—both misreads and places undue reliance on one other CEA provision. Thus, the phrase relied on

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ment] that occur when a futures contract is actually performed or an option is exercised. The futures or options contract is not a transaction in a commodity but insofar as it may presage some future transfer of the commodity, the latter is excepted from the Treasury amendment by the 'unless' clause." *Board of Trade*, 677 F.2d at 1154 n.33.

by the Fourth Circuit ("transactions in commodities involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' ") cannot refer to all transactions involving the commodity, because *options* are separately addressed later in the same provision. 7 U.S.C. § 5 (last two sentences). More pointedly, the provision does not use "transactions in [commodities]" standing alone (as the Treasury Amendment does), but as part of a phrase that specifically includes the words "future delivery"—words that the CEA uses *whenever* referring to futures, and which are conspicuously absent in the relevant language of the Treasury Amendment. In any event, since other CEA provisions reinforce the distinction between transactions "in" and transactions "involving" (7 U.S.C. § 16(e)) and between transactions in commodities and transactions in futures or options (7 U.S.C. § 13(d)), usage comparisons among CEA provisions are of questionable weight: as Salomon explained in the Fourth Circuit, "it is impossible to impose a model of precise, single-author draftsmanship on a statutory scheme that is a patchwork of many different Acts and amendments subsequently embroidered upon the initial enactment of 1921." Salomon Br. 17. In sum, nothing in the Fourth Circuit's textual analysis justifies rejection of the natural "cash transactions" meaning of the Treasury Amendment.[27]

2. *Legislative History and Policy.* The Fourth Circuit was also wrong in its reliance on legislative history to support its reading of the Treasury Amendment. That reliance rests entirely on a single item in the legislative materials leading to enactment of the Amendment as part of

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[27] As noted, the Fourth Circuit provided no analysis whatever to justify its effort to limit the consequences of its reading of the Treasury Amendment by declaring its holding restricted to trading by large investors—a restriction that Salomon and the United States have both argued is without any foundation in the Amendment. Pet. App. 22a.

the 1974 expansion of the CEA: the letter from the Department of the Treasury making the initial formal proposal for a provision that, as modified by Congress, became the Amendment. Pet. App. 18a. Without that letter, there would be no remotely plausible argument for the Fourth Circuit's view based on legislative history. But there are a number of reasons—over and above the heavy burden of justifying a departure from the construction supported by the text—why the fact that the Department's letter used the term "futures" is not enough to justify the Fourth Circuit's construction of the Amendment as removing both options and futures from the coverage of the CEA.

First, the Department's letter nowhere even hints that the proposed Amendment covers *options* involving the listed commodities. (In fact, Congress deleted the options included among the listed commodities in Treasury's proposal.) *See* S. Rep. 1131, *supra*, at 49-51. Second, no one in *Congress*—not a Committee, not a Senator, not a Representative—ever asserted that the Amendment was to cover even "futures," let alone options; accordingly, as the Seventh Circuit explained, there are "no grounds to believe that the Senate Committee adopted the opinion of the Treasury Secretary concerning the scope of the Treasury amendment." *Board of Trade*, 677 F.2d at 1155 n.34. Indeed, the congressional committees' avoidance of any reference to "futures" or "options" in their own descriptions of the Amendment suggests disagreement with Treasury's apparent view. *See* S. Rep. 1131, *supra*, at 23 ("trading *in* foreign currencies") (emphasis added); *id.* at 6 ("trading *of* foreign currencies") (emphasis added); H.R. Conf. Rep. 1383, 93d Cong., 2d Sess. 35 (1974) (same). Third, there is reason to think that the Treasury Department itself erred in referring to the existing interbank market as a "futures" market, because in 1978 Treasury clearly described that market as involving "forwards"—which, it acknowledged,

bore similarities to futures. *See* note 19, *supra*.[28] For those reasons, the Department's reference in its letter is at best a very weak basis for inferring congressional intent.

On the other side, the legislative history supplies evidence of Congress's intent that powerfully undermines the Fourth Circuit's position. Thus, even as the Treasury Amendment was being proposed, the congressional committees specifically included foreign currency among the commodities they insisted be brought under the CEA by expansion of the "commodity" definition. S. Rep. 1131, *supra*, at 19; H.R. Rep. 975, *supra*, at 41, 153-54. The Fourth Circuit's reading of the Amendment means, implausibly, that the committees *sub silentio* reversed that intended coverage. Moreover, under the Fourth Circuit's reading, firms like Salomon Forex are free to engage in trading of futures and options without *any* federal regulation or any connection to an interest in the underlying commodity. That result is hardly consistent with the congressional "intent to fill all regulatory gaps" (120 Cong. Rec. 34736, 34997 (1974) (statement of conference managers)) or, indeed, with the narrower goal to avoid *dual* regulation of certain kinds of trading by banks (*see Board of Trade*, 677 F.2d at 1154)—which would, ordinarily, be expected to have an interest in the underlying currency or financial instruments listed in the Amendment.

Finally, and most broadly, the Fourth Circuit's expansive reading of the Treasury Amendment flies in the face of the pervasive congressional insistence that trading of futures and options be regulated. *See, e.g., In re Stovall, supra*, at 23,779-80 ("Congress endeavored to

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[28] In fact, the problem that led to the Treasury Amendment was first raised *not* by the Treasury Department but by an official from the Chase Manhattan Bank, who specifically contrasted the "commodity futures market" from the "interbank foreign exchange market." *Commodity Futures Trading Commission Act, Hearings on S. 2485 et al. Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess. 771-72 (1974).

force *all* futures transactions, as opposed to cash-deferred future delivery transactions, onto regulated contract markets, which, as a result of government oversight, were to be free from manipulations and other market disturbances."). Even today, exemptions are authorized only under the conditions deemed appropriate by the CFTC (7 U.S.C. §§ 6(c), 6c) or under SEC supervision (7 U.S.C. § 6c(f)). Absent extraordinary evidence, an exception to a comprehensive regulatory scheme should not be read to undermine the most fundamental policies of the statute (*see John Hancock, supra*) and, even more strangely, to make subjection to the regime entirely voluntary with the regulated parties. That is the result the Fourth Circuit's reading of the Treasury Amendment produces.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 15, 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 92-1406

SALOMON FOREX, INCORPORATED,
Plaintiff-Appellee,

v.

LASZLO N. TAUBER, M.D.,
Defendant & Third Party Plaintiff-Appellant,

and

LASZLO N. TAUBER, M.D. AND ASSOCIATES,
Defendant,

v.

SALOMON BROTHERS, INCORPORATED; SALOMON, INCORPORATED; FRED GATLING,
Third Party Defendants-Appellees,

and

PAUL MOZER,
Third Party Defendant.

THE BOARD OF TRADE OF THE CITY OF CHICAGO; CHICAGO MERCANTILE EXCHANGE; UNITED STATES OF AMERICA; FUTURES INDUSTRY ASSOCIATION, INCORPORATED; MANAGED FUTURES ASSOCIATION; FOREIGN EXCHANGE COMMITTEE; COMMODITY FUTURES TRADING COMMISSION; STATE OF IDAHO, DEPARTMENT OF FINANCE; NEVADA SECURITIES DIVISION OF THE OFFICE OF THE SECRETARY OF STATE,
Amici Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria
T. S. Ellis, III, District Judge

(CA-91-1415-A)

Argued: May 6, 1993

Decided: October 18, 1993

Before PHILLIPS, NIEMEYER, and WILLIAMS, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Phillips and Judge Williams joined.

OPINION

NIEMEYER, Circuit Judge:

This appeal, taken from the district court's enforcement of a trading debt, squarely presents the issue of whether professional traders may individually negotiate sales of foreign currency futures and options off organized exchanges without violating the Commodities Exchange Act, 7 U.S.C. § 1, *et seq.* Finding that the Act is inapplicable to such trading and that there are no other defenses to enforcement of the debt in question, we affirm the judgment of the district court.

I

Over the course of 2½ years Dr. Laszlo N. Tauber, a surgeon from northern Virginia, entered into 2,702 transactions with Salomon Forex, Inc. and related entities, each transaction involving the sale of foreign cur-

rency futures[1] and options. Tauber's trading with Salomon Forex was just one aspect of his dealings in foreign currency, which were on a large scale. During the relevant period, Tauber traded with more than a dozen other companies besides Salomon Forex, exchanging billions of dollars worth of currency. He compared prices from various sources and bought currency at the most advantageous rate, often using one transaction to cover the risks of another. Tauber individually negotiated terms for these currency transactions, both with Salomon Forex and with other companies.

Tauber's wholly-owned foreign currency trading company, Westwood Options, Inc., holds a seat on the nation's largest foreign currency exchange, the Philadelphia Stock Exchange. Tauber himself is worth, by the estimate of the district court, over half a billion dollars, and he owns extensive real estate holdings as well as foreign currency investments. Tauber maintains foreign bank accounts which he uses to carry out foreign currency transactions and uses foreign currency mortgages in connection with his real estate ventures. While Tauber was trading with Salomon Forex, Salomon Forex did not conduct trading of this type with any other individual investor—all of Salomon Forex's other foreign currency investment clients were institutions. The district court found that Tauber is a "sophisticated foreign currency trader."

Tauber's dealings with Salomon Forex involved foreign currency solely as an investment; they were not aimed at the acquisition of actual foreign currency. Rather than take physical delivery of the actual currency he purchased from Salomon Forex, Tauber typically entered

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[1] While Salomon Forex characterizes these transactions as forwards rather than futures, the district court declined to resolve the contracts' nature, noting that summary judgment is appropriate whether the contracts are futures or forwards. The difference between a forward and a future is discussed in Part II, below.

into counterbalancing transactions with Salomon Forex by the time the contract matured. Initially, Salomon Forex's staff would contact Tauber's staff to inquire as to where currency was to be delivered when a contract matured. Salomon Forex later began placing the legend "Always Nets to Zero" on the written confirmation notices for Tauber's transactions. Only four of the Tauber-Salomon Forex contracts resulted in delivery of actual currency.

In March 1991, Tauber's investments, particularly in Swiss francs, declined sharply in value and Salomon Forex demanded that Tauber cover his open positions. When Tauber failed to do so, Salomon Forex ceased trading with him. Just over $25 million became due and payable under 68 futures contracts that matured in July and August 1991, leaving Tauber with a total outstanding account balance of $30 million owing to Salomon Forex. After applying $4 million in collateral that it was holding to this balance, Salomon Forex billed Tauber for almost $26 million. When Tauber refused to pay, Salomon Forex brought this suit. Tauber responded with numerous defenses, contending that the transactions he negotiated with Salomon Forex were illegal under the Commodities Exchange Act and that therefore he should not be held responsible for them. Tauber also argued that his contracts are void as violating New York state law. With his answer, Tauber filed counterclaims for negligence and for breach of contract. On Salomon Forex's motion for summary judgment, the district court entered judgment in favor of Salomon Forex, finding that Tauber had not met his burden of presenting evidence that he had any viable counterclaim or defense to his debt. This appeal followed.

II

The central issue in this case is whether Congress intended transactions such as those between Salomon Forex and Tauber to be regulated by the Commodities Exchange

Act ("CEA"). In order to resolve this issue, it is first necessary to understand the history and purpose of that Act.

Congress enacted the Futures Trading Act, Pub. L. No. 67-66, 42 Stat. 187, in 1921 to regulate boards of trade on which futures trading occurred, primarily to prevent price manipulation and what many perceived as excessive speculation in grains. *See* William L. Stein, *The Exchange-Trading Requirement of the Commodity Exchange Act*, 41 Vand. L. Rev. 473, 477 & n.23 (1988) (collecting relevant legislative history). The Act also sought to eliminate "bucket shops," businesses that offered small investors the opportunity to speculate, and indeed even wager, on the price of commodities through unreported deals. While a bucket shop typically attempted to match a customer order exposing the shop to the risk of upward price movement with an order exposing it to the risk of a downward movement, it nevertheless purported to assume the risk of any net positions. When, however, the market prices moved adversely to the bucket shop's net position, it usually closed, leaving behind uncollectible debts.

One year after its passage, the Futures Trading Act was declared unconstitutional as an improper exercise of the taxing power. *See Hill v. Wallace*, 259 U.S. 44 (1922). Congress swiftly responded with the Grain Futures Act of 1922, Pub. L. No. 67-331, 42 Stat. 998, which derived its authority from the broad powers granted by the Commerce Clause. Numerous changes and amendments followed over the years, and the statutory framework established by the Grain Futures Act gradually developed into the Commodities Exchange Act in its present form. *See* 7 U.S.C. §§ 1-25.

Today the CEA establishes a comprehensive system for regulating futures contracts and options. It provides at its core that no person shall enter into, or offer to enter into, a transaction involving the sale of a "com-

modity for future delivery," unless it is conducted on or through a board of trade designated and regulated by the Commodity Futures Trading Commission ("CFTC") as an exchange ("contract market"). *See* 7 U.S.C. §§ 2, 6. The Act also regulates transactions of the character of an option. *See* 7 U.S.C. § 6c.

Because the Act was aimed at manipulation, speculation, and other abuses that could arise from the trading in futures contracts and options, as distinguished from the commodity itself, Congress never purported to regulate "spot" transactions (transactions for the immediate sale and delivery of a commodity) or "cash forward" transactions (in which the commodity is presently sold but its delivery is, by agreement, delayed or deferred). Thus § 2a(1)(A) of the Act, 7 U.S.C. § 2, provides that "futures" regulated by the Act do not include transactions involving actual physical delivery of the commodity, even on a deferred basis. Transactions in the commodity itself which anticipate actual delivery did not present the same opportunities for speculation, manipulation, and outright wagering that trading in futures and options presented. From the beginning, the CEA thus regulated transactions involving the purchase or sale of a commodity "for future delivery" but excluded transactions involving "any sale of any cash commodity for deferred shipment or delivery." 7 U.S.C. § 2. The distinction, though semantically subtle, is what the trade refers to as the difference between "futures," which generally are regulated, and "cash forwards" or "forwards," which are not. *See generally* David J. Gilberg, *Regulation of New Financial Instruments under the Federal Securities and Commodities Laws*, 39 Vand. L. Rev. 1599, 1603-08 (1986) (discussing distinction between futures and forwards); Lewis D. Solomon & Howard B. Dicker, *The Crash of 1987: A Legal and Public Policy Analysis*, 57 Fordham L. Rev. 191, 193-96 (1988) (describing evolution of forwards and futures); Stein, *supra*, at 486-92 (detailing legislative history of forward/future distinc-

tion); Mark D. Young & William L. Stein, *Swap Transactions under the Commodity Exchange Act: Is Congressional Action Needed?*, 76 Geo. L. J. 1917, 1923-24 (1988) (describing distinction between forwards and futures).

A "futures contract," or "future," never precisely defined by statute, nevertheless has an accepted meaning which brings it within the scope of transactions historically sought to be regulated by the CEA. It is generally understood to be an executory, mutually binding agreement providing for the future delivery of a commodity on a date certain where the grade, quantity, and price at the time of delivery are fixed. To facilitate the development of a liquid market in these transactions, these contracts are standardized and transferrable. Trading in futures seldom results in physical delivery of the subject commodity, since the obligations are often extinguished by offsetting transactions that produce a net profit or loss. The main purpose realized by entering into futures transactions is to transfer price risks from suppliers, processors and distributors (hedgers) to those more willing to take the risk (speculators).[2] Since the prices of futures are contingent on the vagaries of both the production of the commodity and the economics of the marketplace, they are particularly susceptible to manipulation and excessive speculation.

In contrast to the fungible quality of futures, cash forwards are generally individually negotiated sales of commodities between principals in which actual delivery of the commodity is anticipated, but is deferred for reasons of commercial convenience or necessity. These contracts are not readily transferable and therefore are usually en-

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[2] In addition to transferring risk, futures trading increases consumers' knowledge of future price trends in a commodity by providing incentives to study and forecast its supply and demand. *See United States v. Dial*, 757 F.2d 163, 165 (7th Cir.), *cert. denied*, 474 U.S. 838 (1985).

tered into between parties able to make and receive physical delivery of the subject goods.

This case also involves a third type of instrument, options or option contracts, which are defined by traditional contract principles. Unlike futures and cash forwards which create mutually binding obligations, the option holder incurs no obligation, but rather pays a fee or other consideration for obtaining the enforceable obligation of the option giver to sell or buy upon demand. Thus, the total risk assumed in purchasing an option is the loss of the fee. A commodity option confers on its holder the right, but not the obligation, to buy (a "call option") or to sell (a "put option") a specific amount of a commodity at a fixed price by a date certain.

The present controversy centers on the 1974 amendments to the CEA, in which Congress greatly expanded the scope of the Act's regulation. Act of Oct. 23, 1974, 88 Stat. 1389 (codified as amended at 7 U.S.C. §§ 1-25). The definition of "commodity" was substantially broadened to include, in addition to specified agricultural products, "all other goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in," except for specific items not relevant to the present discussion. *See* 7 U.S.C. § 1a. Because the CEA uses the term "commodity" in setting the jurisdiction of the CFTC, that agency's jurisdiction under the Act was greatly expanded by this redefinition. *See* 7 U.S.C. § 2.

The General Counsel of the Department of the Treasury, in response to the prospect of this proposed expansion of the definition of "commodity," wrote a letter to the Senate Committee on Agriculture and Forestry on behalf of the Department. In this letter he proposed explicit recognition of an exception to CEA coverage which he assumed Congress to have implicitly intended, that off-exchanged trading of foreign exchange futures was not to

be regulated under the CEA. This letter stated, in pertinent part:

> The Department believes the bills contain an ambiguity that should be clarified. The provisions of the bills do not clearly indicate that the new regulatory agency's authority would be limited to the regulation of futures trading on organized exchanges, and would not extend to futures trading in foreign currencies off organized exchanges. We do not believe that either the House of Representatives or your Committee intends the proposed legislation to subject the foreign currency futures trading of banks or other institutions, other than on an organized exchange, to the new regulatory regime.
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> The Department feels strongly that foreign exchange futures trading, other than on organized exchanges, should not be regulated by the new agency. Virtually all futures trading in foreign currencies in the United States is carried out through an informal network of banks and dealers. This dealer market, which consists primarily of the large banks, has proved highly efficient in serving the needs of international business in hedging the risks that stem from foreign exchange rate movements. The participants in this market are sophisticated and informed institutions, unlike the participants on *organized* exchanges, which, in some cases, include individuals and small traders who may need to be protected by some form of governmental regulation.
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> Where the need for regulation of transactions on other than organized exchanges does exist, this should be done through strengthening existing regulatory responsibilities now lodged in the Comptroller of the Currency and the Federal Reserve. These agencies are currently taking action to achieve closer supervision of the trading risks involved in these activities. The Commodity Futures Trading Com-

> mission would clearly not have the expertise to regulate a complex banking function and would confuse an already highly regulated business sector. Moreover, in this context, new regulatory limitations and restrictions could have an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors.

S. Rep. No. 1131, 93d Cong., 2d Sess. 49-51 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5843, 5887-89.[3]

To establish the recommended exclusion, the Treasury Department proposed an amendment, which was adopted almost verbatim and ultimately codified at 7 U.S.C. § 2:

> Nothing in this chapter [7 U.S.C. § 1, *et seq.*] shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

7 U.S.C. § 2.[4] It is this language, known as the Treasury Amendment, which Salomon Forex contends exempts the transactions between it and Tauber from regulation by the CEA.

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[3] The Treasury letter goes on to express concern with regulation of markets in various other types of financial instruments, including, for example, installment loan contracts and futures trading in mortgages. Because such transactions are generally between large and sophisticated investors, the Treasury recommended that they also not be made to fall within the coverage of the CEA.

[4] The sole change Congress made in the amendment was that whereas the Treasury's version would have excluded from CEA regulation "puts and calls for securities," these were not excluded under the enacted version.

III

Tauber's principal defense rests on the ground that his transactions with Salomon Forex are unenforceable because they violate the CEA. Tauber claims that the CEA requires that foreign currency futures be traded exclusively on exchanges designated by the CFTC and that options be traded either on such exchanges or on securities exchanges designated by the Securities Exchange Commission. 7 U.S.C. §§ 6, 6c(b), 6c(f). Resting on the Act's broad definition of commodity, *see* 7 U.S.C. § 2, which all parties concede includes foreign currency, and the requirement that transactions involving the purchase or sale of a commodity for future delivery must be conducted on a regulated exchange, Tauber argues that these transactions are illegal "because the foreign currency futures transactions at issue in this case took place *off any exchange*." [5] (Emphasis added).

In response to the district court's conclusion that Tauber's transactions were exempted from CEA regulation by the Treasury Amendment, which exempts from regulation all off-exchange "transactions in foreign currency," Tauber argues that the exemption applies only to "transactions in the actual commodity." The purchase or sale of options or futures is not, he maintains, "in that natural sense, a transaction in the commodity itself." He contends that the Treasury Amendment was intended only to exempt from regulation "spot" transactions (involving the immediate sale and conveyance of a commodity) and "cash forward" transactions (involving a present sale with deferred delivery), neither of which, he argues, describes his transactions with Salomon Forex.

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[5] While it has been Tauber's position before the district court and on appeal that his transactions were conducted off exchange, after an amicus brief suggested that Salomon Forex is a "board of trade" as used in 7 U.S.C. § 2, Tauber stated that he agreed. While we would be inclined to reject that position, we choose not to decide its validity since it was not argued before and decided by the district court.

Tauber contends that his interpretation of the Treasury Amendment is supported by *Board of Trade v. Securities Exchange Commission,* 677 F.2d 1137 (7th Cir. 1982), *vacated as moot,* 459 U.S. 1026 (1982). Although he recognizes that the decision was vacated as moot because of a subsequently adopted amendment to the Act, Tauber argues that the holding is still authoritative on construction of the CEA. Two other cases relied upon by Tauber are *Chicago Mercantile Exchange v. Securities Exchange Commission,* 883 F.2d 537, 544 (7th Cir. 1989), *cert. denied,* 496 U.S. 936 (1990), and *CFTC v. American Board of Trade, Inc.,* 803 F.2d 1242 (2d Cir. 1986). At bottom, Tauber contends that these cases distinguish the statutory language of the Treasury Amendment, "transactions *in,*" from "transactions *involving*" foreign currency, assigning the former phrase only to transactions in which physical delivery of the commodity itself is anticipated. Tauber's position is supported by the Commodities Futures Trading Commission, which submitted a brief as an amicus curiae. *See also* SEC-CFTC Jurisdictional Correspondence [1975-1977 transfer binder] Comm. Fut. L. Rep. (CCH) ¶ 20,117, at 20, 831-41 (CFTC Staff Response Dec. 3, 1975).

Tauber also points to portions of the legislative history that show that Congress intended to exempt only transactions conducted among members of an international network of banks and dealers which trade in foreign currencies. *See, e.g.,* H.R. Conf. Rep. No. 1383, 93d Cong. 2d Sess. 35 (1974); S. Rep. No. 1131, *supra* at 6, 23, 31. He contends that in all of the explanations about the Act contained in the legislative history, no reference is found which suggests that futures and options involving foreign currency were being exempted from regulation. Finally, Tauber argues that if the Treasury Amendment is construed to apply to futures, it applies only to banks and financial institutions that engage in such transactions among themselves.

Salomon Forex characterizes this case as a standard breach of contract action involving privately negotiated futures and options contracts of the kind entered into daily by foreign currency dealers and banks. Contracts of this kind are routinely the basis for trading in foreign currencies and are, it contends, exempt from CEA regulation by reason of the Treasury Amendment adopted in 1974 pursuant to the Treasury Department's proposal. Salomon Forex argues that the Treasury Amendment is a broadly-worded exemption, bringing with in its scope all types of "off-exchange" arrangements for dealing in foreign currencies, including futures and options contracts. Arguing from the plain meaning of the Amendment and using other statutory interpretation tools, Salomon Forex asserts that Congress intended to leave unregulated all transactions conducted off exchanges "in which foreign currency *is the actual subject matter.*" As does Tauber, Salomon Forex relies on the legislative history and agency interpretation to support its position.

We are thus presented with the question of whether the individually negotiated, off-exchange futures and options contracts between Salomon Forex and Tauber involving foreign currencies are regulated by the CEA.

The *amici curiae* argue, for various reasons, that the answer to this question will have far-reaching effects. The Commodity Futures Trading Commission states that an interpretation which leaves these transactions unregulated frustrates the regulatory scheme developed by Congress over a period of 70 years "to secure the economic benefits of price discovery while protecting against the evils of price manipulation, excessive speculation, and boiler rooms which harm commerce and the public." Such an interpretation, the CFTC argues, would permit any individual to participate in futures contracts involving foreign currency, and "bucket shops and boiler rooms, the very type of fraudulent businesses Congress sought to outlaw in enacting the CEA, would inevitably follow." The

Board of Trade of the City of Chicago and Chicago Mercantile Exchange support the veiws of the Commission and add that such an interpretation would "threaten the commercial viability of the [commodity] exchanges." The State of Idaho, Department of Finance, and the Nevada Securities Division of the Office of the Secretary of State argue that if we adopt the interpretation advanced by Salomon Forex, the regulation of transactions of the kind here involved would probably be subject to regulation by the Securities Exchange Commission, a result not intended by Congress.

The United States in its *amicus curiae* brief urges that if we interpret the CEA to regulate the traditionally unregulated markets, market efficiency would be reduced and innovation in the development of new mechanisms would be inhibited, all with the tendency to increase the cost of financing government debt. The Securities Exchange Commission joins in the position of the United States. The Foreign Exchange Committee, which includes representatives of major domestic and foreign commercial and investment banks and foreign currency brokers, contends with great alarm that regulation of the United States portion of the foreign currency markets "would result in extra-ordinary costs and would damage the United States' ability to compete as a world financial center." They contend that regulation would adversely affect the large and developing global market in foreign currency forwards and options in which the 1989 average daily turnover approximated $50 billion. The Futures Industry Association, Inc. and the Managed Futures Association contend similarly that regulation of off-exchange transactions in foreign currencies "poses a potential threat to the continuing, smooth functioning" of the market.

IV

Interpretations of the Treasury Amendment have varied with the role of the interpreter. The Commodity Futures Trading Commission, pressing for greater regulation of

transactions in foreign currencies, contends that the Treasury Amendment's exemption is intended to be narrowly tailored to exclude only spot and cash forward transactions, leaving all other futures and options to be regulated by the broad inclusive regulatory language of the Act. Foreign currency traders and the United States contend that off-exchange trades must not be burdened by regulation, and the plain meaning of the Treasury Amendment expressly so provides. At bottom, however, we are left solely with the task of determining what *Congress* intended.

The analysis begins, as with the interpretation of any legislative enactment, with the language of the Act, and if that conclusively reveals Congress' intent, the analysis ends. In arriving at the plain meaning, we apply long recognized principles of interpretation. We assume that the legislature used words that meant what it intended; that all words had a purpose and were meant to be read consistently; and that the statute's true meaning provides a rational response to the relevant situation. Conversely, we presume that language added by amendment was not mere surplusage; that undefined terms mean no more than the language imports; and that a statute is not self-contradictory or otherwise irrational. The interpretive process is thus a holistic endeavor to derive intent from statutory language and structure.

Turning to the language at issue, the CEA excludes from its regulation "transactions in foreign currency" unless they involve sales "for future delivery conducted on a board of trade." 7 U.S.C. § 2. We must decide whether "transactions in foreign currency" includes futures and options of the type traded in by Salomon Forex and Tauber. The phrase "transactions in foreign currency" is broad and unqualified. Its breadth is confirmed by the "unless" clause which removes from "transactions in foreign currency" those transactions which are "for future delivery conducted on a board of trade." If Congress meant for the clause "transactions in foreign cur-

rency" to apply only to transactions in the commodity itself, it would have no reason to exclude futures transactions conducted on an exchange. The class of transactions covered by the general clause "transactions in foreign currency" must include a larger class than those removed from it by the "unless" clause in order to give the latter clause meaning. Thus, because the clause "unless such transactions involve the sale thereof for future delivery conducted on a board of trade" refers to futures, the general clause "transactions in foreign currency" must also include futures. Under this analysis, we would have to construe the Treasury Amendment exempting transactions in foreign currency to reach beyond transactions in the commodity itself and to include *all* transactions in which foreign currency is the subject matter, including futures and options.

A similar analysis in a larger context leads to the same result. The CEA and its predecessor Acts dating back to 1921 have always regulated only futures and options and never spot transactions or cash forwards. From the beginning the CEA has excluded cash forward transactions with the following language: "the term 'future delivery,' as used in this chapter, shall not include any sale of any cash commodity for deferred shipment or delivery." 7 U.S.C. § 2. Thus in 1974, when the Treasury Amendment was enacted, if Congress intended to limit the Amendment to spots and cash forwards in foreign currencies, as argued by Tauber, no amendment would have been necessary. All concede that these transactions were already excluded before the Treasury Amendment was adopted. The Treasury Amendment can only have meaning if it is interpreted to exclude something more than that which was already excluded before it was enacted.

In order to maintain that the clause "transactions in foreign currency" applies only to spots and cash forwards, as Tauber argues, we would also need to read in some

qualifying language. While it is rational to argue that "transactions in foreign currency" is different from "transactions *in contracts* for foreign currency," when that distinction is applied to actual transactions, the reasoning falters. For instance, while transactions that involve contemporary delivery of the commodity might be a transaction "in" the commodity, why would a cash forward be analytically different from a future? Neither transaction involves contemporaneous delivery. Both transactions involve the purchase of a promise—a contract right—and only indirectly concern the underlying subject matter. Moreover, in practice, cash forwards are often offset by other transactions in a manner similar to the way futures are traded. *See, Statutory Interpretation Concerning Forward Transactions*, 55 Fed. Reg. 39188, 39191-92 (Sept. 25, 1990).

Finally, the language of the Treasury Amendment excluding "transactions in" the subject goods is used elsewhere in the Act to mean all transactions *involving* the commodity. *See, e.g.*, 7 U.S.C. § 5 ("*Transactions in commodities* involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' are affected with a national public interest." (emphasis added)).

Once we conclude that the clause is to be read broadly to include futures, it is a short step to conclude that the Treasury Amendment applies to *all* transactions in which foreign currencies are the subject matter, including options. Since trading in both futures and options involves foreign currency, albeit indirectly, there is no principled reason to distinguish between them in this context.

We are thus satisfied that under the appropriate interpretation of the Treasury Amendment, all off-exchange transactions in foreign currency, including futures and options, are exempted from regulation by the CEA.

That Congress intended the Treasury Amendment be taken at its word is confirmed by the Amendment's legis-

lative history. The uniformly expressed legislative intent behind the Treasury Amendment confirms that "transactions in foreign currency" are not limited to forwards. The concern that led to the adoption of the Treasury Amendment was that the informal network of established dealers in foreign currency-based investments would otherwise be brought within the ambit of the CEA. S. Rep. No. 1131 at 49-51, *reprinted in* 1974 U.S.C.C.A.N. at 5887-89. As the Senate report stated regarding the Agriculture and Forestry Committee's adoption of the Treasury Amendment:

> [T]he Committee included an amendment to clarify that the provisions of the bill are not applicable to trading in foreign currency and certain enumerated financial instruments unless such trading is carried out on a formally organized futures exchange. A great deal of the trading in foreign currency in the United States is carried out through an informal network of banks and tellers.[6] The Committee believes that this market is more properly supervised by the bank regulatory agencies and that, therefore, regulation under this legislation is unnecessary.

Id. at 19, *reprinted in* 1974 U.S.C.C.A.N. at 5863. Moreover, it was clearly understood that this off-exchange network of banks and dealers engaged in the very type of futures transactions that are involved in this case. When the 1974 amendments to the CEA were first proposed, the Treasury Department wrote the appropriate Senate committee, "The Department feels strongly that foreign exchange *futures trading*, other than on organized exchanges, should not be regulated by the new agency" (emphasis added). It proposed an amendment to accomplish that wish which Congress adopted virtually verbatim (excluding from the proposed amendment only

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[6] So in the original. "Traders" rather than "tellers" would seem to have been intended, from the context.

"puts and calls for securities" because they were covered by the securities laws). This Treasury request and direct congressional response is revealing.

To accept Tauber's reading of the Treasury Amendment would be to ignore the Amendment's plain meaning, legislative history, and context. It would also likely result in substantial market disruptions. The United States, advising this court as an *amicus curiae*, describes the significant disruption of the when-issued market for Treasury securities that would result if we were to adopt such an unnaturally restricted reading. The Foreign Exchange Committee in its *amicus* brief has also detailed the vast reach of the over-the-counter transactions which would be affected by an expansion of the CEA by this court.

We thus read the Treasury Amendment to apply to futures and options, and not solely to forwards. Tauber argues that such a reading is not fatal to his case, however, relying upon the alternative claim that even if some trading in foreign currency forwards and options is excluded, the exclusion applies only to trading carried out between banks. In making this argument, Tauber relies upon the references to protection of the "interbank market" found in the Treasury Amendment's legislative history, principally in the letter proposing the Amendment, and the references to bank regulation found in the Amendment's statutory history.

The Treasury letter does in fact refer to protection of the interbank market in foreign exchange futures. S. Rep. No. 1131, at 49-51, *reprinted in* 1974 U.S.C.C.A.N. at 5887-88. It notes, however, that this market is comprised of "an informal network of banks *and dealers.*" *Id.* at 5887 (emphasis added). The Treasury Department's concern was that CFTC regulation would "have an adverse impact on the usefulness and efficiency of foreign exchange markets *for traders and investors.*" *Id.* at 5888 (emphasis added). The Treasury Department, in pro-

posing and drafting the Treasury Amendment, did not draw a distinction between banks and professional traders; it drew a distinction between the "informal network of banks and dealers" intended to be excluded and "the participants on organized exchanges." *Id.* The trading between Tauber and Salomon Forex clearly falls into the former, not the latter, category, leaving Tauber's argument that the Treasury Amendment is restricted to trading between banks unsupported by the Amendment's legislative history.

More important than the lack of historical support for Tauber's alternative position is the absence of any such distinction in the statutory text. The statute distinguishes only between on-exchange and off-exchange trading. Under the statutory scheme, it is the nature of the trade (whether a standardized trade within an organized market or an individually negotiated private deal), not the corporate form of the trader that determines whether a trade is within the Act.

If the congressional goal underlying adoption of the Treasury Amendment was protection of the interbank market in foreign exchange forwards, this could have been accomplished easily by statutory language aimed at exempting only transactions in which both buyer and seller were banks. What the statute commands instead is the exemption of all trading off organized exchanges, including the entire informal professional trading network of which banks are a key part. As the trading between Salomon Forex and Tauber consisted of large-scale, customized, negotiated, bilateral transactions between sophisticated financial professionals, it falls within this classification and is not included within CEA coverage.

Tauber finally relies heavily on decisions of the Second and Seventh Circuits in defending his position, arguing that affirmance of the district court would result in a split among the circuits. The decisions to which Tauber cites

do not conflict with the outcome we reach today, however, as both cases concerned *on-exchange* trading on behalf of the general public, not individual, large-scale deals between professionals.

In *Commodity Futures Trading Comm'n v. American Bd. of Trade, Inc.*, 803 F.2d 1242 (2d Cir. 1986), the Second Circuit upheld the closing of an exchange which the Commodity Futures Trading Commission had not approved. The defendant in that case, the American Board of Trade ("ABT"), acted as an exchange for options on various commodities, including foreign currency. The CFTC sued because the ABT was not properly registered, and the district court enjoined further trading and ordered recompense of all monetary losses suffered by customers. The ABT appealed, claiming, *inter alia*, that the Treasury Amendment excluded its transactions in options on foreign currency from CEA regulation. The Second Circuit affirmed the district court. Although the court, in dictum, seemed to indicate that no trading in foreign currency options or futures is excluded from CEA coverage because such trading is not trading "in" foreign currencies, at the same time it noted that such trading *is* excluded when carried out by sophisticated financial institutions. *Id.* at 1248-49. This inconsistency reveals that the key factor for the Second Circuit in deciding the case was not the subject matter of the deals—options and futures in foreign currency—but the identity of the parties—unsophisticated private individuals buying on an organized exchange.

The Seventh Circuit faced a similar situation in *Board of Trade v. S.E.C.*, 677 F.2d 1137 (7th Cir.), *vacated as moot* 459 U.S. 1026 (1982). In this case, the Securities and Exchange Commission had authorized a formally organized exchange trading in options on Government National Mortgage Association mortgage-backed pass through certificates (GNMA's or Ginnie Maes). The Seventh Circuit held that exchange trading of such in-

struments fell within the CEA and concluded that the CFTC, not the SEC, had authority over such trading. Again, no off-exchange trading was involved.

Tauber argues that affirmance of the district court will result in the use of this circuit as a base for marketing off-exchange futures contracts to the general public. In doing so he misapprehends the issue which this case presents. This case does not involve mass marketing to small investors, which would appear to require trading through an exchange, and our holding in no way implies that such marketing is exempt from the CEA. *Cf. Commodity Futures Trading Commission v. Standard Forex, Inc.*, —— F. Supp. ——, slip op. at p. 25 (E.D.N.Y. 1993) (holding that Treasury Amendment excludes off-exchange transactions among banks already regulated and not transactions on a board of trade with "private unsophisticated investors"). The parties here agree that the transactions between Salomon Forex and Tauber were off-exchange transactions individually negotiated, and it is amply demonstrated that Tauber is a sophisticated investor. We hold only that individually-negotiated foreign currency option and futures transactions between sophisticated, large-scale foreign currency traders fall within the Treasury Amendment's exclusion from CEA coverage. They are "transactions in foreign currency . . . [that do not] involve the sale thereof for future delivery conducted on a board of trade." Tauber was, thus, not engaged in trading on an unregulated exchange, but was rather engaged in off-exchange trading of the sort exempted from coverage of the CEA by the Treasury Amendment.

V

Tauber argues that even if the CEA is not applicable, enforcement of his debt on summary judgment was inappropriate for other reasons. He contends that (1) his debt resulted from transactions violative of state law; (2) Salomon Forex was negligent in its handling of his

account, resulting in a viable counterclaim; and (3) Salomon Forex breached an oral "best pricing" covenant in its dealings with him. We find these additional arguments to be without merit.

Tauber argues that the transactions he engaged in with Salomon Forex were illegal under New York's bucket shop statute, 23 N.Y. Gen. Bus. Law § 351, and that the resulting debt is therefore unenforceable. It is, however, an element of a violation of § 351 that the offending contract be made "without intending a bona fide purchase or sale" of the subject matter and with the intent to settle the account by reference to market quotations. The agreements between Salomon Forex and Tauber were bona fide contracts, resulting in legal obligatons to take delivery. They were not settled by reference to the dealings of others, but by further trading between the parties, who engaged in offsetting transactions. The New York statute does not ban legally enforceable trades settled by further transactions, but only sham transactions. As the Supreme Court noted more than eight decades ago in finding that offsetting transactions did not render futures sales violative of the Illinois bucket shop law:

> It seems to us an extraordinary and unlikely proposition that the dealings which give its character to the great market for futures sales in this country are to be regarded as mere wagers or as "pretended" buying or selling . . . . A set-off is in legal effect a delivery.

Board of Trade of the City of Chicago v. Christie Grain & Stock Co., 198 U.S. 236, 249 (1905).

Tauber also asserts a counterclaim for negligence on the part of Salomon Forex, but is unable to cite sufficient evidence to create a triable issue of fact on this matter. In particular, Tauber has presented no evidence of any damages from the negligence alleged. In agreeing to trade with Tauber, Salomon Forex required that Tauber

post collateral to cover potential losses from sudden movements in currency markets. The amount of collateral required was keyed to Tauber's total exposure and was recalculated (by computer) as this fluctuated. In October 1989, Salomon announced that it had miscalculated Tauber's exposure to loss and that rather than having an excess of $15 million in collateral on deposit, Tauber had a deficit of $10 million. Tauber sent several letters to Salomon acknowledging that his exposure was now correctly calculated and promising to provide additional collateral. He expressly agreed to terms for providing this collateral, but failed to follow through on them.

Although Tauber did not cover this shortfall in collateral, the parties continued trading until March 1991, when Tauber's trading position became sharply negative as a result of a fall in the value of the Swiss franc, and Salomon Forex refused to continue trading without additional collateral. The only evidence offered linking Tauber's 1991 losses to the 1989 recalculation of required collateral is a single statement made at his deposition:

> I protested [the change in collateral required], but I could not do anything because I was locked in that position and my argument was always from day one that if it would be an American option, then I understood it, but in a European option, you cannot exercise that option any other day than the day of expiration.

This uncorroborated and unelaborated allegation of damage is insufficient to bear Tauber's burden of coming forward with evidence of the existence of a factual controversy as to liability. It identifies no duty that was breached and ignored Tauber's contractual undertakings when engaging in these transactions.

Finally, Tauber claims to have been damaged by Salomon Forex's breach of an alleged oral agreement to

provide him the "best price" on foreign currency options and futures. No evidence of the existence of such an agreement has been presented, leaving it without power to bar summary judgment. The sole support cited by Tauber as evidence of the existence of such an agreement is his own statement in an affidavit that:

> In 1987, Geraldine McManus, then an employee of Salomon, solicited my foreign currency trading. She represented at that time that Salomon was a leader in the world capital markets, that it could offer the best pricing on foreign currency instruments, the best market information, and the best execution of foreign currency market trades.

Based upon this allegation, Tauber argues that he had reached an oral agreement with Salomon Forex that they would offer him only the best price and that this agreement was later breached. Accepting Tauber's statement as true, as we must in reviewing the grant against him of summary judgment, it still does not establish any such "best-pricing" agreement. Further, all trades between Salomon and Tauber were confirmed in writing, and the confirmations provided that any objection be made in writing within 10 days. Tauber signed and returned the majority of these confirmations, although they did not include any "best pricing" clause, and never objected to the terms of the contracts.

VI

Tauber owes Salomon Forex the $26 million amount as a result of speculation on options and futures in foreign currencies. While Tauber claims his transactions with Salomon Forex are unenforceable because they did not comply with the CEA, the Treasury Amendment to the CEA, in exempting off-exchange transactions "in foreign currency," exempts off-exchange sales of options and futures in foreign exchange from CEA regulation. The trading between Salomon Forex and Tauber was off-

exchange, involving individually negotiated deals between sophisticated traders, and was therefore excluded from CEA coverage by the Treasury Amendment. Tauber's argument that his trading with Salomon Forex was illegal under state law prohibiting bucket shops is equally ineffective because his trading involved legally enforceable futures and option contracts, not sham transactions. Finally, there is no bona fide dispute as to the amount of Tauber's indebtedness or the existence of any counterclaim to its enforcement. The judgment entered in favor of Salomon Forex is, therefore, affirmed.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil No. 91-1415-A

SALOMON FOREX INC.,
Plaintiff,

v.

LASZLO N. TAUBER,
Defendant.

LASZLO N. TAUBER, M.D.,
Counter-Plaintiff and
Third-Party Plaintiff,

v.

SALOMON FOREX INC.,
Counter-Defendant,

v.

SALOMON BROTHERS INC., *et al.*,
Third-Party Defendants.

MEMORANDUM OPINION

[Filed June 1, 1992]

INTRODUCTION

This case presents a significant question concerning the scope of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 1 *et seq.* (1980 & Supp. 1992) ("CEA"). At issue specifically is whether certain foreign currency trading contracts are exempt from CEA regulation.

Salomon Forex Inc. ("Salomon Forex"), a foreign currency brokerage company, sued Dr. Laszlo Tauber, an individual foreign currency trader, for breach of sixty-eight foreign currency trading contracts. Tauber filed a counterclaim against Salomon Forex and certain third-party defendants [1] challenging the validity of over 2700 foreign currency trading contracts, including the sixty-eight disputed in the complaint. A host of issues came before the Court on the parties' motions for summary and partial summary judgment. Addressed here is the threshold question, novel in this circuit and others, whether the foreign currency transactions into which Salomon Forex and Tauber entered are exempt from CEA regulation. For the reasons elaborated below, the Court concludes that the foreign currency contracts at issue are not within the scope of the CEA. The consequence of this is that counterclaims and defenses to contract formation and enforceability based on CEA violations fail.[2]

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[1] The third-party defendants are Salomon Brothers, Inc., Salomon, Inc., and Fred Gatling, Vice President of Salomon Brothers, Inc. Paul Mozer, head of the foreign exchange desk for Salomon Forex from 1990 to 1991 an original third-party defendant, was dismissed from the case for lack of personal jurisdiction.

[2] A number of other defenses and counterclaims were also raised by the pleadings and disposed of by the Court on summary judgment, leading to a grant of summary judgment in favor of Salomon Forex for $25,831,453.01, plus pre-judgment interest at the Virginia statutory rate. Among the issues involved in these other defenses and counterclaims were allegations of common law and statutory fraud, violations of state "bucketing" and gambling laws, negligence, breach of fiduciary duty, duress, failure to mitigate

FACTS

Salomon Forex is a prominent foreign currency trading company with offices in New York, London, Tokyo, and the world's principal foreign exchange markets. Tauber, a general surgeon practicing in Northern Virginia, is by all accounts an unusual person. The record indicates that he is a physician with an active medical practice who is also a major real estate investor [3] and foreign currency trader. It is the latter incarnation that is relevant here. Evidence suggests his net worth exceeds half a billion dollars.

Since 1981, Tauber has engaged in extensive foreign currency trading involving billions of dollars worth of foreign currency, primarily Swiss francs and Australian dollars. Over the years, Tauber has traded large quantities of foreign currency with at least fourteen well-known brokerage companies. In addition, Tauber traded foreign currency through his wholly-owned foreign currency trading company, Westwood Options, Inc., holder of a seat on the Philadelphia Stock Exchange, the nation's largest foreign currency exchange. To facilitate his foreign currency trading, Tauber subscribed to "Telerate," a computerized Dow-Jones service providing current market quotations and related data. Using Telerate, Tauber monitored foreign currency markets from computer terminals in his home and elsewhere. Tauber also maintained foreign bank accounts, which he used on several occasions to effectuate foreign currency transactions. And Tauber occasionally used foreign currency mortgages in connection with his real estate holdings. Notwithstanding Tauber's

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damages, estoppel, waiver, statute of frauds violations, breach of an implied covenant of good faith and fair dealing, breach of an express warranty of "best pricing," and breach of a duty to disclose material information relating to purported market manipulation.

[3] Included among Tauber's real estate interests across the country is a seventy-five percent share in Laszlo N. Tauber & Associates, which is one of the federal government's largest private landlords.

self-serving assertions to the contrary, the record evidence persuasively establishes that Tauber was a sophisticated foreign currency trader during the time relevant to this action.

Tauber engaged in foreign currency transactions with Salomon Forex from 1987 to 1991. He was Salomon Forex's only non-institutional client during this period. Salomon Forex's complaint arises over sixty-eight foreign currency futures [4] and options contracts that matured, and in the case of the options, were exercised in July and August of 1991. Tauber's counterclaim concerns 1,260 foreign currency futures contracts and 1,442 foreign currency options contracts. None of the contracts involved in the complaint or the counterclaim were executed on a board of trade or a formally organized exchange.[5] They were, in other words, conducted "off-exchange." [6]

A futures contract is a contract for the purchase or sale on a specific date in the future (the "trade date") of a specified amount of foreign currency at an agreed value. When the trade date arrives, the parties are obligated to consummate the transaction by delivery or receipt of the currency at the agreed price. Tauber and Salomon Forex both acted as buyers and sellers in their futures contracts. Frequently, they arranged off-setting transactions involv-

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[4] This nomenclature, used throughout this memorandum opinion, does not reflect any decision by the Court that these contracts were "futures" rather than "cash forwards" contracts for purposes of determining whether they might be exempt from the CEA under the "cash forwards contracts" exemption. *See* 7 U.S.C. §§ 2, 6(a). Given the result reached here, that issue need not be decided and is left for another day.

[5] Under the CEA, a "board of trade" is "any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling commodity or receiving the same for sale on consignment." 7 U.S.C. § 2.

[6] Tauber's course of dealing with Salomon Forex was not unusual in this regard. Much of his trading with other major brokerage firms also occurred off-exchange.

ing exactly the same amount of foreign currency in lieu of actual delivery or receipt of currency. The precise form of the set-off varied depending on market conditions, the investment strategies of the parties, and the like. The futures contract inured to the benefit of the buyer if the agreed price turned out to be lower than the market price on the trade date and to the seller if the agreed price was higher.

Options contracts function differently. In an options contract, one party pays the other a fee for the right—or option—to purchase or sell a specific amount of foreign currency on a future date certain at an agreed price. At various times during the course of their dealings, both Tauber and Salomon Forex held purchase or sale options offered by the other. If on the agreed date the transaction benefitted the option holder, the option holder exercised it, and the offering party was then obligated to purchase or sell foreign currency as specified in the contract. Usually, but not always, Tauber supplanted actual delivery or receipt of the foreign currency with an offsetting transaction.[7] If exercising the option would not be advantageous, the option holder did nothing and merely sacrificed the amount of the fee.

Tauber generally provided collateral, usually consisting of letters of credit or secured interests in other assets, for the foreign currency contracts made with Salomon Forex. In the event Tauber was unable to meet his contractual obligations, due to an inability to pay for currency he was obligated to purchase or to provide currency he was obligated to sell, Salomon Forex could look to the collateral to cover the resulting indebtedness. This case stems in part from Tauber's failure to post adequate security.

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[7] The record shows that on at least four occasions Tauber took actual delivery of foreign currency.

Specifically, by letter dated September 10, 1990, Tauber acknowledged his exposure to Salomon Forex to be approximately $24 million. He promised to provide additional security. By letter agreement dated February 21, 1991, the parties agreed to interim measures to protect Salomon Forex against losses incurred as a result of Tauber's foreign currency trading. These arrangements were to continue until August 31, 1991. Tauber failed to comply with the terms of this letter agreement, as well as with subsequent written and oral agreements to post additional collateral made as late as May 1991. Thus, when $25,831,453.01 became due and payable by Tauber under the sixty-eight contracts that matured in July and August 1991, Salomon Forex was inadequately secured. This lawsuit ensued.

ANALYSIS

The threshold issue raised by the parties' motions is whether the disputed foreign currency contracts violated the CEA. If so, the contracts would be unenforceable as a matter of law, and the controversy would cease in so far as the enforceability of the contracts is concerned. If, on the other hand, the contracts did not violate the CEA, the Court would then need to consider defendants' other defenses to contract formation and enforceability. For the purposes of this case, divining whether the contracts violated the CEA entails two steps. First is the question whether the contracts are exempt from the CEA under the so-called "Treasury Amendment," 7 U.S.C. § 2. If so, the inquiry under the CEA ends. If not exempt, the second question is whether the contracts are exempt under any other CEA provision apart from the Treasury Amendment.[8]

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[8] Given the dispositive result here of the first step, the Court did not reach this second step. Salomon Forex argued two additional statutory exemptions. First, it asserted that the futures contracts were exempt under the "cash forwards contracts" exemption. *See* 7 U.S.C. §§ 2, 6a. Second, it claimed that the options

Congress enacted the CEA, as amended, 7 U.S.C. §§ 1 *et seq.* (1980 & Supp. 1992), to combat excessive speculation and price manipulation in commodity trading involving future delivery as commonly conducted on a board of trade. *See* 7 U.S.C. § 5. The CEA established the Commodity Futures Trading Commission (the "CFTC"), *see* 7 U.S.C. § 4a, and empowered it to regulate commodity trading for future delivery conducted on boards of trade in accordance with the regulatory scheme embodied in the statute. *See* 7 U.S.C. §§ 1 *et seq.* *See generally Statutory Interpretation Regarding Trading in Foreign Currencies For Future Delivery,* 50 Fed. Reg. 42983, [1984-86 Transfer Binder] Comm. Fut. Law Rep. ¶ 22,750, at 31,121 (Oct. 23, 1985) (the "CFTC Statement"). Prior to 1974, the CEA governed only certain enumerated, generally agricultural commodities. *See* 7 U.S.C. § 2 (1970). Over the years, Congress modified and expanded the CEA's definition of "commodity". Significantly, in 1974, Congress enlarged the definition effectively to include foreign currency and other financial instruments.[9] *See* Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (1974) (codified as amended at 7 U.S.C. § 2). The resulting definition of "commodity" is encyclopedic:

> The word "commodity" shall mean wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums,

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contracts were exempt under the "trade options" exemption. *See* 7 U.S.C. §§ 6c(b) and (d). Without deciding these issues, the Court notes, *obiter,* that disposition of these claims likely would require resolution of disputed material issues of fact, thereby precluding summary judgment.

[9] Among other changes, the 1974 amendments augmented the previously enumerated commodities with the phrase: "all other goods and articles, . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." *See* Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (1974) (codified as amended at 7 U.S.C. § 2).

> mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions as provided in section 13-1 of this title, and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in . . . .

7 U.S.C. § 2. Thus, virtually every conceivable good, article, right, or interest—except onions [10]—is potentially a commodity within the meaning of the CEA. Given this, it is undisputed and indisputable that foreign currency may be a commodity for purposes of the CEA.

Prior to enactment of the 1974 amendments, the Treasury Department became concerned that the proposed expansion of CFTC jurisdiction would adversely impact existing off-exchange markets for foreign currency and certain other financial instruments. Accordingly, the Department proposed an exemption for off-exchange transactions for future delivery in foreign currency and certain enumerated financial instruments. *See* S. Rep. No. 1131, 93rd Cong., 2d Sess. 49-51 (1974) (reprinting letter dated July 30, 1974, from the General Counsel of

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[10] Trading in onion futures is prohibited, 7 U.S.C. § 13-1(a). This provision brought tears to the eyes of at least some would-be onion futures traders. *See Chicago Mercantile Exchange v. Tieken*, 178 F. Supp. 779 (D.C. Ill. 1959) (finding that a rational basis existed for Congress' conclusion that the speculative aspect of plaintiff's business in onion futures trading caused severe and unwarranted fluctuations in cash price of onions to the detriment of onion producers and the orderly flow of onions in interstate commerce, and accordingly holding that the statute was within the scope of congressional authority over interstate commerce and did not violate due process). Violating this statute is a misdemeanor punishable by a $5,000 fine. 7 U.S.C. § 13-1(b).

the Treasury to the Chairman of the Senate Committee on Agriculture and Forestry) (the "Treasury Letter"). The Treasury Letter listed several reasons for exempting off-exchange transactions for future delivery in foreign currency and certain other financial instruments. These reasons included (i) the existence of an already-regulated interbank market, (ii) the capacity of existing regulatory entities, namely the Comptroller of the Currency and the Federal Reserve, to regulate these transactions, (iii) lack of expertise of the CFTC in regulating complex banking functions, and (iv) the potential for "an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors." Treasury Letter at 50.

With one exception not relevant here, Congress adopted the Treasury Department's proposed provision, enacting what is now commonly called the "Treasury Amendment." [11] *See* Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (1974) (codified as amended at 7 U.S.C. § 2). The Treasury Amendment states, in pertinent part: "Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency . . ., unless such transactions involve the sale thereof for future delivery conducted on a board of trade." [12] 7 U.S.C. § 2. Although the transactions in this case involved sales for future delivery, none was conducted on a board of trade. *Cf. Abrams v. Oppenheimer Government Securities, Inc.*, 589 F. Supp. 4, 7 (N.D. Ill. 1983) (holding that the

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[11] Congress deleted "puts and calls for securities" from the list of exempted transactions proposed by the Treasury Department. *Compare* 7 U.S.C. § 2 *with* Treasury Letter at 51.

[12] The provision reads in full: "Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade." 7 U.S.C. § 2.

Treasury Amendment applied (and hence the CEA did not) to a contract for Government National Mortgage Association securities because it was not executed through an organized exchange). This being so, the disputed contracts are exempt from the CEA if they constitute "transactions in foreign currency." The central question presented then is the meaning and scope of this statutory phrase.

The touchstone of statutory interpretation is legislative intent as expressed in the statute's words. Thus, the well-settled starting point in the interpretive inquiry is the language of the statute itself. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030 (1989); *Matala v. Consolidated Coal Co.*, 647 F.2d 427, 429 (4th Cir. 1981) (stating the basic principles of statutory interpretation and applying them to § 203(b)(3) of the Federal Coal Mine Health and Safety Act of 1964). *See also Buckeye Production Credit Association v. Farm Credit Administration*, —— F. Supp. ——, —— n.18, 1992 W.L. 57606, 10 n.18 (E.D. Va. 1992) (noting, in interpreting the Farm Credit Act, that "the best and most reliable indication of legislative intent is the statutory language itself"). Where the terms of a statute are unambiguous, the judicial inquiry is complete, except "in rare and exceptional circumstances." *See Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701 (1981) (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 n.33, 98 S.Ct. 2279, 2298 n.33 (1978)). *See also Ron Pair Enterprises*, 489 U.S. at 242, 109 S.Ct. at 1031 (plain meaning of legislation conclusive except in rare circumstances where literal application of a statute would lead to a result demonstrably at odds with congressional intent); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250 (1982) (same); *In re Forfeiture Hearings as to Caplin & Drysdale, Chartered*, 837 F.2d 637, 641 (4th Cir. 1988) (where a statute's language is unambiguous, court's task of statutory construction ends unless enforcement of

statutory language would contravene clearly expressed legislative intent); *Hoechst Aktiengesellschaft v. Quigg*, 917 F.2d 522, 526 (Fed. Cir. 1990) (same). The plain meaning of a statute should be rejected only if there is substantial, unambiguous evidence supporting a contrary interpretation. *Matala*, 647 F.2d at 430. *See also Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3, 101 S.Ct. 2239, 2241 n.3 (1981) ("Absent a clear indication of legislative intent to the contrary, the statutory language controls its construction."). For purposes of statutory interpretation, words of a statute are presumed to be used according to their ordinary meaning unless a different use is clearly indicated. *See Matala*, 647 F.2d at 429.

Applied here, these well-established principles of statutory interpretation compellingly point to the conclusion that the foreign currency contracts between Tauber and Salomon Forex are covered by the Treasury Amendment and thus excluded from regulation under the CEA. Simply put, in the CEA context, the phrase "transactions in foreign currency" plainly and unambiguously means any transaction, without limitation as to the participants involved, in which foreign currency is the commodity or subject matter, much as one would speak of transactions in flaxseed or wool tops. This clear statutory language gives rise to no lurking ambiguities. Given this, the judicial inquiry properly ceases here without resort to legislative history. *See Ron Pair Enterprises*, 489 U.S. at 242, 109 S.Ct. at 1031; *Griffin*, 458 U.S. at 571, 102 S.Ct. at 3250; *Rubin*, 449 U.S. at 430, 101 S.Ct. at 701; *Caplin & Drysdale*, 837 F.2d at 641; *Hoechst Aktiengesellschaft*, 917 F.2d at 526.

But in any event, the CEA's legislative history discloses no clear, unambiguous basis for concluding, as Tauber insists, that "transactions in foreign currency" contains a limitation on the transactional participants. Specifically, Tauber contends that the Treasury Amendment exempts

only those transactions between financial institutions, that is, the "interbank" market. Tauber argues, by selective references, that the legislative history reveals a congressional intent to restrict the scope of the exemption to the interbank market.[13] Tauber's position fails in two respects. First, the Treasury Amendment's plain language is not qualified in any respect to limit the covered participants. And legislative history may not be invoked to create an ambiguity where none otherwise exists. *See Railroad Comm'n of Wisconsin v. Chicago, Burlington and Quincy R.R. Co.*, 257 U.S. 563, 589, 42 S.Ct. 232, 238 (1922) (legislative history admissible to solve doubt, not create it); *Matala*, 647 F.2d at 430 ("The legislative history should never be used to create doubt if the language of a statute is plain on its face.") (citations omitted). Second, even if resorting to legislative history were appropriate, nothing contained therein indicates congressional intent to exclude *only* the interbank market. That Congress may have expressed concern about a particular circumstance, or reacted to Treasury Department concern about a particular circumstance, does not, by itself, demonstrate that Congress intended to address only that circumstance. Indeed, other portions of the legislative history suggest that the Treasury Department sought, and Congress intended, a broad exemption for off-

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[13] *See* S. Rep. No. 1131, 93rd Cong., 2d Sess. 6 (1974) ("the *Committee* amendment provides that inter-bank trading of foreign currencies and specified financial instruments is not subject to Commission regulation") (emphasis in original); S. Rep. No. 1194, 93rd Cong., 2d Sess. 35 (1974) ("the *Senate* amendment provides that interbank trading of foreign currencies and specified financial instruments is not subject to Commission regulation") (emphasis in original); Treasury Letter at 49-51 (discussing concern that CFTC jurisdiction not extend to the regulation of off-exchange transactions conducted by financial institutions and observing that "virtually all futures trading in foreign currencies in the United States is carried out through an informal network of banks and dealers. . . . The participants in this market are sophisticated and informed institutions, unlike the participants on *organized* exchanges . . . .") (emphasis in original).

exchange transactions for future delivery in foreign currency and certain enumerated financial instruments.[14] Taken as a whole, the legislative history reveals no clear and unambiguous expression of legislative intent to restrict the Treasury Amendment to the interbank market sufficient to warrant rejecting the plain, unambiguous, ordinary meaning of the statutory language. *See Ford Motor Credit Co*, 452 U.S. at 158 n.3, 101 S.Ct. at 2241 n.3; *Matala*, 647 F.2d at 429-30. Especially instructive here is *Bank Brussels Lambert, S.A. v. Intermetals Corp.*, 779 F. Supp. 741, 751 (S.D.N.Y. 1991). Presented there with an essentially similar argument, that court reviewed legislative history and held that the Treasury Amendment is not limited to the interbank market in cases of spot trading of foreign currency. In so doing, the court concluded that "even if it is correct that Con-

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[14] *See* S. Rep. No. 1131, 93rd Cong., 2d Sess. 23, 31 (1974) ("the Committee included an amendment to clarify that the provisions of the bill are not applicable to trading in foreign currencies and certain enumerated financial instruments unless such trading is conducted on a formally organized futures exchange. A great deal of the trading in foreign currency in the United States is carried out through an informal network or banks and tellers. The Committee believes that this market is more properly supervised by the bank regulatory agencies and that, therefore, regulation under this legislation is unnecessary." and "transactions in foreign currency, security warrants and rights, resales of installment loan contracts, repurchase options, government securities or mortgages and mortgage purchase commitments would not be subject to the Act unless they involve the sale thereof for future delivery conducted on a board of trade."); Treasury Letter at 49-50, 51 ("The Department feels strongly that foreign currency futures trading, other than on organized exchanges, should not be regulated by the new agency;" "[w]here the need for regulation of transactions on other than organized exchanges does exist, this should be done through strengthening existing regulatory responsibilities not lodged in the Comptroller of the Currency and the Federal Reserve;" and "we strongly urge the Committee to amend the proposed legislation to make clear that its provisions would not be applicable to futures trading in foreign currencies or other financial transactions of the nature described above other than on organized exchanges.").

gress' *motivation* . . . was to exempt interbank trading . . . statutory history of this nature cannot be a substitute for express terms of the statute." (emphasis in original).[15]

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[15] The CFTC statutory interpretation relied on by Tauber to establish the interbank market limitation is unpersuasive. There, the CFTC opined:

> Solely as a result of these expressions of concern by the [Treasury] Department [the Treasury Letter], and only for the purpose of addressing these specific concerns, Congress adopted, virtually without change, a provision recommended by the Treasury . . . and which is generally referred to as the "Treasury Amendment." Insofar as foreign currency transactions were concerned, Congress expressed its intention that the Treasury Amendment be limited in its application to the interbank trading of such transactions supervised by the banking agencies. *See* S. Rep. No. 1131, 93rd Cong., 2d Sess. 6, 23, 31 (1974); S. Rep. No. 1194, 93rd Cong., 2d Sess. 35 (1974).

CFTC Statement at 31,122. The CFTC concluded that the Treasury Amendment does not apply to off-exchange foreign currency transactions involving members of the general public and solicited written comments concerning that nature and identity of the "sophisticated and informed institutions" comprising the interbank market. CFTC Statement at 31,125.

The CFTC's reasoning here is flawed. Congress may well have adopted the Treasury Amendment to address the specific concerns of the Treasury Department, but those concerns, as expressed in the Treasury Letter, were not limited to protecting the interbank market. Moreover, as noted above, the statutory language, on its face, does not express any intention to limit application of the Treasury Amendment to the interbank market. Nor can the legislative history cited by the CFTC reasonably be viewed as standing for the proposition that Congress intended to exempt only the interbank market. *See supra* notes 13, 14 and accompanying text. Simply put, the CFTC, in an apparent effort to maximize its jurisdictional reach, overreaches any reasonable interpretation attributable to the statutory language or legislative history.

This CFTC misinterpretation underscores the difficulty inherent in divining legislative intent from legislative history and reaffirms the sensible and well-settled principle that the plain language of a statute is conclusive absent substantial, unambiguous evidence supporting a contrary interpretation. *See Ford Motor Credit Co.*, 452 U.S. at 158 n.3, 101 S.Ct. at 2241 n.3; *Matala*, 647 F.2d at 430. As this Court has elsewhere noted, legislative history is frequently

Tauber also claims that the word "in" in the phrase "transactions in foreign currency" is ambiguous, at least with respect to the options contracts. Specifically, Tauber contends that the options contracts are not transactions "in" foreign currency. Rather, he asserts that they are transactions "in" rights to exercise options that merely "involve" foreign currency. While this may have some semantical appeal, once the option is exercised and the foreign currency traded or exchanged, the transaction, even by Tauber's lights, becomes one "in" foreign currency under the plain language of the Treasury Amendment. *Accord Commodity Futures Trading Comm'n v. American Board of Trade*, 803 F.2d 1242, 1248 (2nd Cir. 1986) (permitting CFTC to enjoin public offerings of options to trade in foreign currency because "an option transaction giving the option holder the right to purchase foreign currency by a specified date and at a specified price does not become a 'transaction[] in' that currency unless and until the option is exercised.").[16] Here, the option contracts between Tauber and Salomon Forex were exercised when they matured in July and August of 1991. Thus, the exercised options contracts became transactions "in" foreign currency exempt from regulation under the CEA.

That the bulk of the contracts ultimately resulted in off-setting transactions, rather than actual receipt or de-

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an unreliable indicator of legislative intent. *See Buckeye*, —— F. Supp. at —— n.18, 1992 W.L. 57606, 10. *See generally* Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 Harv. L. Rev. 1005 (1992).

[16] *See also Board of Trade of City of Chicago v. S.E.C.*, 677 F.2d 1137, 1154 (7th Cir.), *vacated as moot*, 459 U.S. 1026, 103 S.Ct. 434 (1982) (finding), in the context of Government National Mortgage Association options, that "the options market may exist without any transactions in the commodity itself" and that a GNMA option is a transaction "in" government securities under the Treasury Amendment "[o]nly when the option holder exercises the option."). The reasons for the mootness of this opinion are unstated.

livery of foreign currency, does not alter this result. A set-off is, in legal effect, a delivery. *See Board of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 248, 25 S.Ct. 637, 639 (1905) (Holmes, J.). Under the exercised options contracts, the parties had the obligation and capacity to deliver or accept delivery of the specified foreign currency at the set prices on the fixed dates. Put another way, upon exercising the option, the option holder had the immediate and absolute legal right to insist that the foreign currency be delivered. That the parties elected for commercial convenience, necessity, or other reasons to forgo actual delivery in favor of entering into new, separate, off-setting contracts is of no legal consequence with respect to the delivery obligation under the original contract. That original legal obligation to make or take delivery makes the exercised options, in sum and substance, "transactions in foreign currency." *Cf. In re Bybee*, 945 F.2d 309 (9th Cir. 1991) (deferring, in the context of a dispute over the "cash forwards contracts" exemption, to the CFTC view that subsequent off-setting contracts do not impair contractual delivery obligations).[17]

In essence, the Court finds the Treasury Amendment is unmistakably clear and unambiguous on its face. All transactions in which foreign currency is the actual sub-

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[17] The CFTC language followed by the Ninth Circuit reads:

> [that] while such [offset] agreements may extinguish a party's delivery obligation, they are separate, individually negotiated, new agreements, there is no obligation or arrangement to enter into such agreements, they are not provided for by the terms of the contracts as initially entered into, and any party that is in a position in a distribution chain that provides for the opportunity to book-out [offset] with another party or parties in the chain is nevertheless entitled to require delivery of the commodity to be made through it, as required under the contracts.

Statutory Interpretation Concerning Forward Transactions, 55 Fed. Reg. 39188, 39189 (Sept. 15, 1990).

ject matter of an off-exchange contract for future delivery are exempt from the CEA. Further judicial inquiry is not required. To the extent that Congress may have intended a more restrictive exemption, it could easily have so stated. In any event, a search of the legislative history discloses no substantial, unambiguous evidence supporting a more restrictive interpretation. That Congress intended to accommodate the Treasury Department's concerns as expressed in the Treasury Letter is reasonably clear. That Congress intended to exclude off-exchange transactions in foreign currency for future delivery conducted by the interbank market from CFTC regulation is pellucidly clear. Yet this purpose is not at odds with the plain and ordinary language of the statutory provision as enacted. Nothing in the legislative history suggests unambiguously that Congress intended to exempt *only* the interbank market. Nor does the result reached here frustrate any clearly expressed legislative intent. *See Ron Pair Enterprises,* 489 U.S. at 242, 109 S.Ct. at 1031; *Griffin,* 458 U.S. at 571, 102 S.Ct. at 3250; *Caplin & Drysdale,* 837 F.2d at 641; *Hoeschst Aktiengesellschaft,* 917 F.2d at 526. Having determined, therefore, that the Treasury Amendment excludes the disputed contracts from the CEA, the Court need not, and does not, consider whether the contracts are also exempt under any other CEA provision.[18]

CONCLUSION

In sum, the Court holds that the foreign currency futures and options contracts between Tauber and Salomon Forex are not subject to regulation under the CEA because they were off-exchange "transactions in foreign currency" for future delivery within the purview of the Treasury Amendment. Thus, nothing in the CEA bars their enforcement.

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[18] Also left for another day is the question of the appropriate measure of damages for CEA violations. *See* 7 U.S.C. § 25.

An appropriate Order has issued with respect to this holding and other matters addressed from the bench.

/s/ T. S. Ellis, III
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
June 1, 1992

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil No. 91-1415-A

SALOMON FOREX INC.,
Plaintiff,

v.

LASZLO N. TAUBER,
Defendant.

LASZLO N. TAUBER, M.D.,
Counter-Plaintiff and
Third Party Plaintiff,

v.

SALOMON FOREX INC.,
Counter-Defendant,

v.

SALOMON BROTHERS INC., *et al.*,
Third Party Defendants.

ORDER

This matter comes before the Court on plaintiff's and third-party defendants' Motion for Summary Judgment and defendant's Motion for Partial Summary Judgment.

For the reasons stated from the bench,[1] the Court concludes that:

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[1] These reasons will be amplified in part in a forthcoming memorandum opinion.

1. Plaintiff's and third-party defendants' Motion for Summary Judgment on the complaint and the counterclaim third-party complaint should be, and hereby is, GRANTED in favor of plaintiff on (i) the issue of liability under count 1 of the complaint (ii) and all claims of the counterclaim/third-party complaint.

2. Defendant's Motion for Partial Summary Judgment on Counts 1 and 2 of the counterclaim should be, and hereby is, DENIED.

3. Accordingly, all claims of the counterclaim/third-party complaint should be, and hereby are DISMISSED against plaintiff and the third-party defendants WITH PREJUDICE.

4. Plaintiff's and third-party defendants' counterclaim in reply should be, and hereby is, DISMISSED WITH PREJUDICE.

On the issue of the appropriate amount of damages under count 1 of the complaint, defendant asserts that a triable issue of fact remains with respect to his defense of breach of contract based on allegations of price-gouging by plaintiff.[2] Specifically, defendant contends that plaintiff breached an express representation of "best pricing" made by one of plaintiff's sales persons by overcharging him for the options and futures he purchased. In support of this defense, defendant presents expert testimony that concludes, based on the application of generally recognized and accepted economic analysis and testing procedures, that plaintiff overcharged defendant in excess of $18 million.

Although the Court finds that a dispute of fact may exist with respect to whether the prices charged by plain-

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[2] Whether this claim was properly presented as a breach of contract claim is questionable. To the extent that this claim sounds in fraud, the Court rejects it for the reasons stated from the bench.

tiff were the "best price," it nevertheless concludes that this dispute is not material here because defendant cannot establish that the contracts contained express representations of best pricing. Plaintiff sent defendant written confirmations following each of the sixty-eight transactions at issue. These written confirmations provided that defendant would be deemed to have accepted the terms and conditions contained within them unless written objections were made within ten days of their receipt. Defendant confirmed by signature fifty-six of the confirmations. No written objections were made to any of the contracts. The written confirmations did not include any express representation of best pricing. Under the Uniform Commercial Code, as adopted by both Virginia and New York, a written confirmation, even unsigned, is binding on a merchant unless objected to in writing within ten days. *See* U.C.C. § 2-201(2). Defendant qualifies as a merchant for purposes of § 2-201(2). *See* U.C.C. § 2-204; *Armco, Inc. v. New Horizon Dev. Co. of Virginia,* 331 S.E.2d 456 (Va. 1985) (a merchant is "a business professional as opposed to a casual or inexperienced seller or buyer"). Consequently, defendant cannot use parol evidence to add new or contradictory terms to the final expression of the parties' agreements as embodied in the written confirmations. *See* U.C.C. § 2-202; *Intershoe v. Bankers Trust,* 571 N.E.2d 641, 644 (N.Y. 1991) (holding in a foreign currency transaction with a shoe manufacturer that the written confirmation slip constituted the final expression of the parties' agreement and could not be impeached by parol evidence of contradictory terms); *Armco,* 331 S.E.2d at 456 (unobjected to written confirmation for sale of pipe a final expression of the parties' agreement). Accordingly, the Court concludes that no legal basis exists for defendant's defense of breach of express representations of best pricing.

For the above-stated reasons and for the reasons stated from the bench, the Court concludes that summary judg-

ment on the issue of damages should be, and hereby is, GRANTED in favor of plaintiff in the amount of $25,-831,453.01 plus prejudgment interest calculated at the Virginia statutory rate.

Plaintiff is DIRECTED (i) to prepare a sketch of a judgment order setting forth the amounts of damages and prejudgment interest and (ii) to provide defendant with a reasonable opportunity to review the sketch of the order as to form. The form of judgment order is to be submitted to the Court no later than 5:00 p.m., Friday, March 27, 1992.

The Clerk is directed to remove this case from the trial docket.

The Clerk is also directed to send copies of this Order to all counsel of record.

/s/ T. S. Ellis, III
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
March 24, 1992

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 91-1415-A

SALOMON FOREX INC.,
Plaintiff,

v.

LASZLO N. TAUBER, M.D.,
Defendant.

LASZLO N. TAUBER, M.D.,
Counter-Plaintiff and
Third-Party Plaintiff,

v.

SALOMON FOREX INC.,
Counter-Defendant,

v.

SALOMON BROTHERS INC., *et al.*,
Third-Party Defendants.

JUDGMENT ORDER

[Filed March 27, 1992]

In accordance with this Court's Order of March 24, 1992, granting the Motion for Summary Judgment of plaintiff and the third-party defendants, and denying de-

fendant's Motion for Partial Summary Judgment, it is hereby ORDERED AND ADJUDGED:

1. Judgment is hereby entered for plaintiff and against defendant in the amount of $27,266,587.80 (comprising principal amounts due plaintiff of $25,831,453.01 plus prejudgment interest of $1,435,134.79 at nine percent per annum pursuant to Virginia Code § 6.1-330.54). The judgment shall bear interest at the rate of nine percent per annum, or $6,723.27 per diem, pursuant to Virginia Code § 6.1-330.54.

2. Plaintiff shall recover its costs in accordance with Local Rule 16.

The Clerk is directed to send copies of this Judgment Order to all counsel of record.

/s/ T. S. Ellis, III
T. S. ELLIS, III
United States District Judge

Alexandria, Virginia
March 27, 1992

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

C/A 91-1415-A

SALOMON FOREX INC.,
Plaintiff,

vs.

LASZLO N. TAUBER, M.D., *et al.*,
Defendants.

TRANSCRIPT OF PROCEEDINGS
March 24, 1992

CROSS-MOTIONS FOR SUMMARY JUDGMENT

Before: THE HONORABLE T.S. ELLIS, III, Presiding
United States District Court Judge

* * * *

[52] The central issue, as I noted, is whether the Treasury Amendment—that is, 7 United States Code, Section 2—applies in this instance to exclude the transactions from the Commodities Exchange Act. That really is the, the threshold, central issue, because if it does not exclude these matters and they are covered by the Commodities Exchange Act, then there is a substantial additional amount of analysis, as to which we did not take much oral argument. We did have some oral argument on it, but I think even that oral argument which was had on it —I think Mr. Tuohey makes a good point—there are factual issues that are disputed. If it's necessary, if the Treasury Amendment does not exempt the futures, contracts and regulations, was the Commodities Exchange Act violated or does the exception for cash-forward contracts apply: that issue would probably involve factual issues. Further, if the Treasury Amendment doesn't exempt the options and contracts from regulations under the Commodities Exchange Act, the question is whether Section 4c, subsection (c) of the Act that bans option trading except on designated exchanges, was that violated or is there a trade options exception applicable here. That, too, probably involves triable issues of fact, although the Court did not and does [53] not reach those. And if the Commodities Exchange Act was violated, there is further the problem of damages.

Now, the central issue is what is the meaning of 7 United States Code, Section 2, which provides that: Nothing in this chapter—that is, the Commodities Exchange Act—shall be deemed to govern or in any way be applicable to transactions in foreign currency—some omissions—unless such actions involve the sale thereof for future delivery conducted on a board of trade.

So the question is were the 68 contracts transactions, were any of these contracts or options transactions in foreign currency.

It is clear that the most pertinent authority on this is the Second Circuit's decision in the *American Board of*

Trade case, where the court there found that an option transaction giving the option holder the right to purchase foreign currency by a specified date and at a specified price does not become a transaction in that currency unless and until the option was exercised. And where it is exercised, however, then, under the *American Board of Trade* case, they would be within the exception.

Tauber relies on that case. Salomon Forex says that it's distinguishable in terms of result on three grounds: first, that they were in fact exercised, thereby bringing them within the purview of the exceptions; [54] secondly, that it doesn't apply because it's wrongly decided in that it invokes, really, a metaphysical distinction between "transactions in" and "transactions involving;" and thirdly, that it's factually inapposite because the case involved a Commission injunctive action against an exchange.

The Court concludes that while there may be distinctions in *American Board of Trade*, the essential holding is correct. And the Court further concludes that the—in this instance, the Court concludes that the transactions here, the contracts here, are transactions in foreign currency. They were, in effect, exercised. The fact that there were setoffs, the Court is persuaded that Justice Holmes had it right in the *Christie* case, that a setoff is, in legal effect, a delivery. In addition, as the record reflects, on four occasions, that Tauber actually took delivery. So an offset transaction, in the Court's view, amounts to a delivery since the parties had the obligation and the capacity to deliver on the contracts.

Having concluded that, it is unnecessary to proceed to consider whether the speculative purpose for the transaction makes it more likely to be a nonexempt futures contract and, for example, whether the Sections 4c(c) and 4c(d) of the Commodities Exchange Act make the contracts [55] unlawful and so forth, as I outlined earlier.

And on this issue, which I think is fairly novel, the Court may, as soon as it is able consistent with other

cases, including a lengthy jury trial which is shortly to begin, prepare a memorandum opinion to supplement the findings that the Court has made from the bench.

* * * *

[59] * * * But really, I think the central focus given the parties' briefs, I have dealt with. I will [60] probably prepare a memorandum on the applicability of the Commodities Exchange Act and the Treasury exception.

In essence, I am persuaded by the plaintiff's position that stems from the plain language of the amendment and which, in essence, says that if folks want to deal off exchange trading in currencies, the Commodities Exchange Act does not apply. It doesn't matter whether it's an individual or an institution or what the nature of the entity is.

* * * *

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1406
CA-91-1415-A

SALOMON FOREX, INCORPORATED,
Plaintiff-Appellee

v.

LASZLO N. TAUBER, M.D.,
Defendant
& Third Party
Plaintiff-Appellant

and

LASZLO N. TAUBER M.D. AND ASSOCIATES,
Defendant

v.

SALOMON BROTHERS, INCORPORATED;
SALOMON, INCORPORATED; FRED GATLING,
Third Party Defendants-Appellees

and

PAUL MOZER,
Third Party Defendant

THE BOARD OF TRADE OF THE CITY OF CHICAGO; CHICAGO MERCANTILE EXCHANGE; UNITED STATES OF AMERICA; FUTURES INDUSTRY ASSOCIATION, INCORPORATED; MANAGED FUTURES ASSOCIATION,
Amici Curiae

FOREIGN EXCHANGE COMMITTEE,
Amicus Curiae

COMMODITY FUTURES TRADING COMMISSION; STATE OF IDAHO, Department of Finance; NEVADA SECURITIES DIVISION OF THE OFFICE OF THE SECRETARY OF STATE,
Amici Curiae

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

[FILED November 17, 1993]

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

FOR THE COURT

/s/ Bert M. Montague
Clerk

APPENDIX G

STATUTORY PROVISIONS

Pertinent portions of the Commodity Exchange Act (CEA), as amended, include the following*:

7 U.S.C. § 1a (Section 1a of the CEA):

As used in this chapter:

(1) Board of trade

The term "board of trade" means any exchange or association, whether incorporated or unincorporated, of persons who are engaged in the business of buying or selling any commodity or receiving the same for sale on consignment.

* * * *

(3) Commodity

The term "commodity" means wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions as provided in section 13-1 of this title, and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.

* * * *

(*) A codification mistake in 7 U.S.C.A. (Supp. 1993) was corrected in the May 1993 Pamphlet Number 1 for U.S.C.A.

(11) Future delivery

The term "future delivery" does not include any sale of any cash commodity for deferred shipment or delivery.

7 U.S.C. § 2 (Section 2(a)(1)(A) of the CEA):

(i) The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in section 2a of this title, with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title. Except as hereinabove provided, nothing contained in this section shall (I) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (II) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.

(ii) Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

* * * *

7 U.S.C. § 5 (Section 3 of the CEA):

> Transactions in commodities involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest. Such futures transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodities and the products and byproducts thereof in interstate commerce. The prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of commodities and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce. Such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodities and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price. The transactions and prices of commodities on such boards of trade are susceptible to excessive speculation and can be manipulated, controlled, cornered or squeezed, to the detriment of the producer or the consumer and the persons handling commodities and the products and byproducts thereof in interstate commerce, rendering regulation imperative for the protection of such commerce and the national public interest therein. Furthermore, transactions which are of the character of, or are commonly known to the trade as, "options" are or may be utilized by commercial and other entities for risk shifting and other purposes. Options transactions are in interstate commerce or affect such commerce and the national economy, rendering regulation of such transactions imperative for the protection of such commerce and the national public interest.

7 U.S.C. § 6 (Section 4 of the CEA):

(a) Restriction of futures trading to contract markets

Unless exempted by the Commission pursuant to subsection (c) of this section, it shall be unlawful for any person to offer to enter into, to enter into, to execute, to confirm the execution of, or to conduct any office or business anywhere in the United States, its territories or possessions, for the purpose of soliciting or accepting any order for, or otherwise dealing in, any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery (other than a contract which is made on or subject to the rules of a board of trade, exchange, or market located outside the United States, its territories or possessions) unless—

(1) such transaction is conducted on or subject to the rules of a board of trade which has been designated by the Commission as a "contract market" for such commodity;

(2) such contract is executed or consummated by or through a member of such contract market; and

(3) such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery: *Provided*, that each contract market member shall keep such record for a period of three years from the date thereof, or for a longer period if the Commission shall so direct, which record shall at all times be open to the inspection of any representative of the Commission or the Department of Justice.

* * * *

(c) Exemption

(1) In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated as a contract market for transactions for future delivery in any commodity under section 7 of this title) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) of this section (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a) of this section, or from any other provision of this chapter (except section 2(a) of this title), if the Commission determines that the exemption would be consistent with the public interest.

(2) The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) of this section unless the Commission determines that—

(A) the requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this chaper; and

(B) the agreement, contract, or transaction—

(i) will be entered into solely between appropriate persons; and

(ii) will not have a material adverse effect on the ability of the Commission or

any contract market to discharge its regulatory or self-regulatory duties under this chapter.

(3) For purposes of this subsection, the term "appropriate person" shall be limited to the following persons or classes thereof:

(A) A bank or trust company (acting in an individual or fiduciary capacity).

(B) A savings association.

(C) An insurance company.

(D) An investment company subject to regulation under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.).

(E) A commodity pool formed or operated by a person subject to regulation under this chapter.

(F) A corporation, partnership, proprietorship, organization, trust, or other business entity with a net worth exceeding $1,000,000 or total assets exceeding $5,000,000, or the obligations of which under the agreement, contract or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by any such entity or by an entity referred to in subparagraph (A), (B), (C), (H), (I), or (K) of this paragraph.

(G) An employee benefit plan with assets exceeding $1,000,000, or whose investment decisions are made by a bank, trust company, insurance company, investment adviser registered under the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 et seq.), or a commodity trading advisor subject to regulation under this chapter.

(H) Any governmental entity (including the United States, any state, or any foreign government) or political subdivision thereof, or any multinational or supranational entity or any instrumentality, agency, or department of any of the foregoing.

(I) A broker-dealer subject to regulation under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) acting on its own behalf or on behalf of another appropriate person.

(J) A futures commission merchant, floor broker, or floor trader subject to regulation under this chapter acting on its own behalf or on behalf of another appropriate person.

(K) Such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.

(4) During the pendency of an application for an order granting an exemption under paragraph (1), the Commission may limit the public availability of any information received from the applicant if the applicant submits a written request to limit disclosure contemporaneous with the application, and the Commission determines that—

(A) the information sought to be restricted constitutes a trade secret; or

(B) public disclosure of the information would result in material competitive harm to the applicant.

(5) The Commission may—

(A) promptly following the enactment of this subsection, or upon application by any person, exercise the exemptive authority granted under paragraph (1) with respect to classes of

hybrid instruments that are predominantly securities or depository instruments, to the extent that such instruments may be regarded as subject to the provisions of this chapter; or

(B) promptly following the enactment of this subsection, or upon application by any person, exercise the exemptive authority granted under paragraph (1) effective as of October 23, 1974, with respect to classes of swap agreements (as defined in section 101 of Title 11) that are not part of a fungible class of agreements that are standardized as to their material economic terms, to the extent that such agreements may be regarded as subject to the provisions of this chapter.

Any exemption pursuant to this paragraph shall be subject to such terms and conditions as the Commission shall determine to be appropriate pursuant to paragraph (1).

(d) Effect of exemption on authority of Commission

The granting of an exemption under this section shall not affect the authority of the Commission under any other provision of this chapter to conduct investigations in order to determine compliance with the requirements or conditions of such exemption or to take enforcement action for any violation of any provision of this chapter or any rule, regulation or order thereunder caused by the failure to comply with or satisfy such conditions or requirements.

* * * *

7 U.S.C. § 6c (Section 4c of the CEA):

* * * *

(b) Regulated option trading

No person shall offer to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under this chapter which

is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe. Any such order, rule, or regulation may be made only after notice and opportunity for hearing, and the Commission may set different terms and conditions for different markets.

* * * *

(f) Nonapplicability to foreign currency options

Nothing in this chapter shall be deemed to govern or in any way be applicable to any transaction in an option on foreign currency traded on a national securities exchange.

* * * *

7 U.S.C. § 6i (Section 4i of the CEA):

It shall be unlawful for any person to make any contract for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market—

> (1) if such person shall directly or indirectly make such contracts with respect to any commodity or any future of such commodity during any one day in an amount equal to or in excess of such amount as shall be fixed from time to time by the Commission, and
>
> (2) if such person shall directly or indirectly have or obtain a long or short position in any commodity or any future of such commodity equal to or in excess of such amount as shall be fixed from time to time by the Commission,

unless such person files or causes to be filed with the properly designated officer of the Commission such

reports regarding any transactions or positions described in clauses (1) and (2) hereof as the Commission may by rule or regulation require and unless, in accordance with rules and regulations of the Commission, such person shall keep books and records of all such transactions and positions and transactions and positions in any such commodity traded on or subject to the rules of any other board of trade, and of cash or spot transactions in, and inventories and purchase and sale commitments of such commodity. Such books and records shall show complete details concerning all such transactions, positions, inventories, and commitments, including the names and addresses of all persons having any interest therein, and shall be open at all times to inspection by any representative of the Commission or the Department of Justice. For the purposes of this section, the futures and cash or spot transactions and positions of any person shall include such transactions and positions of any persons directly or indirectly controlled by such person.

7 U.S.C. § 7 (Section 5 of the CEA):

The Commission is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

(1) When located at a terminal market where any cash commodity of the kind specified in the contracts of sale of commodities for future delivery to be executed on such board is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the commodity and the differences in value between the various grades of such commodity, and where there is available to such board of

trade, official inspection service approved by the Secretary of Agriculture or the Commission for the purpose: *Provided,* That any board of trade not so located shall be designated as a "contract market" if such board of trade provides for the delivery of commodities on such contracts at a delivery point or points and upon terms and conditions approved by the Commission.

(2) When the governing board thereof provides for the making and filing by the board or any member thereof, as the Commission may direct, of reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Commission, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions or transactions for future delivery consummated on or subject to the rules of a board of trade, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Commission may direct, showing the details and terms of all cash and future transactions entered into by them, consummated on or subject to the rules of a board of trade, such record to be in permanent form, showing the parties to all such transactions, including the persons for whom made, any assignments or transfers thereof, with the parties thereto, and the manner in which said transactions are fulfilled, discharged, or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Commission shall so direct, and shall at all times be open to the inspection of any representative of

the Commission or United States Department of Justice.

(3) When the governing board thereof provides for the prevention of dissemination by the board or any member thereof of false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce.

(4) When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board.

(5) When the governing board thereof does not exclude from membership in and all privileges on such board of trade any duly authorized representative of any lawfully formed and conducted cooperative association of producers having adequate financial responsibility which is engaged in any cash commodity business, if such association has complied, and agrees to comply, with such terms and conditions as are or may be imposed lawfully on other members of such board: *Provided,* That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such association.

(6) When the governing board provides for making effective the final orders or decisions entered pursuant to the provisions of section 9 of this title, and the orders issued pursuant to the provisions of section 7a of this title, and for compliance in all other respects with the re-

quirements applicable to such board of trade under this chapter.

(7) When such board of trade demonstrates that transactions for future delivery in the commodity for which designation as a contract market is sought will not be contrary to the public interest.

(8) When such board of trade demonstrates that every contract market for which such board of trade is designated complies with the requirements of section 7a(b) of this title.

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7 U.S.C. § 9 (Section 6(c) of the CEA):

If the Commission has reason to believe that any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, or has willfully made any false or misleading statement of a material fact in any registration application or any report filed with the Commission under this chapter, or willfully omitted to state in any such application or report any material fact which is required to be stated therein, or otherwise is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Commission thereunder, it may serve upon such person a complaint stating its charges in that respect, which complaint shall have attached or shall contain therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made prohibiting him from trading on or subject to the rules of any contract market, and directing that all contract markets refuse all trading privileges to such person, until further notice

of the Commission, and to show cause why the registration of such person, if registered with the Commission in any capacity, should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the Commission, or before an Administrative Law Judge designated by the Commission, which Administrative Law Judge shall cause all evidence to be reduced to writing and forthwith transmit the same to the Commission. Upon evidence received, the Commission may (1) prohibit such person from trading on or subject to the rules of any contract market and require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, (2) if such persons is registered with the Commission in any capacity, suspend, for a period not to exceed six months, or revoke, the registration of such person, (3) assess such person a civil penalty of not more than the higher of $100,000 or triple the monetary gain to such person for each such violation and (4) require restitution to customers of damages proximately caused by violations of such persons. Notice of such order shall be sent forthwith by registered mail or by certified mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the Commission, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business, or in the case of an order denying registration, the circuit in which the petitioner's principal place of business listed on petitioner's application for registration is located, a written petition, within fifteen days after the notice of such order is given to the offending person praying that the order of the Commission be set aside. A copy of

such petition shall be forthwith transmitted by the clerk of the court to the Commission and thereupon the Commission shall file in the court the record theretofore made, as provided in section 2112 of Title 28. Upon the filing of the petition the court shall have jurisdiction to affirm, to set aside, or modify the order of the Commission, and the findings of the Commission as to the facts, if supported by the weight of evidence, shall in like manner be conclusive.

7 U.S.C. § 13 (Section 9 of the CEA):

(a) It shall be a felony punishable by a fine of not more than $1,000,000 (or $500,000 in the case of a person who is an individual) or imprisonment for not more than five years, or both, together with the costs of prosecution, for:

* * * *

(2) Any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity or knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of section 6 of this title, section 6b of this title, subsections (a) through (e) of subsection 6c of this title, section 6h of this title, section 6*o*(1) of this title, or section 23 of this title.

7 U.S.C. § 25 (Section 22 of the CEA):

(a)(1) Any person (other than a contract market, clearing organization of a contract market, licensed board of trade, or registered futures association) who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages resulting from one or more of the transactions referred to in subparagraphs (A) through (D) of this paragraph and caused by such violation to any other person—

(A) who received trading advice from such person for a fee;

(B) who made through such person any contract of sale of any commodity for future delivery (or option on such contract or any commodity); or who deposited with or paid to such person money, securities, or property (or incurred debt in lieu thereof) in connection with any order to make such contract;

(C) who purchased from or sold to such person or placed through such person an order for the purchase or sale of—

(i) an option subject to section 6c of this title (other than an option purchased or sold on a contract market or other board of trade);

(ii) a contract subject to section 23 of this title; or

(iii) an interest or participation in a commodity pool; or

(D) who purchased or sold a contract referred to in subparagraph (B) hereof if the violation constitutes a manipulation of the price of any such contract or the price of the commodity underlying such contract.

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